United States Court of Appeals

for the Second Circuit

APPENDIX

75-7600

United States Court of Appeals

For the Second Circuit

B

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM	Before: HON. MORRIS E. LASKER District Judge
vs.	
AMERICAN SOCIETY OF COMPOSERS, AUTHORS and PUBLISHERS	69 Civil 5740

New York, December 3, 1973

STENOGRAPHER'S MINUTES

OFFICIAL COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007 WORTHER 4-3580

Columbia BroadcastingSystem

vs. 69 Civ. 5740

American Society of Composers,
Authors and Publishers, et al

New York New York.
December 3, 1973
10:00 A.M.)

(Trial resumed.)

THE COURT: I am ready to go ahead, if you are, Mr. Topkis.

MR. TOPKIS: Indeed, your Honor.

At this time ASCAP would like to call Mr. Herman Finkelstein.

H E R M A N F I N K E L S T E I N, called as a witness on behalf of ASCAP, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TOPKIS:

Q Mr. Finkelstein, you are general counsel of ASCAP?

A I am.

Q For how long have you held that position, sir, or to avoid discussing changes of title, can you tell us for how long you have been ASCAP's chief attorney?

A Since 1943.

Q And before that time, were you in any way involved with ASCAP's affairs?

A Yes. I was associated, I was a member of the of the firm of Schwartz & Froehlich, and before that, I was associated with Nathan Berkin, who was ASCAP's first general counsel.

Q Mr. Finkelstein, I understand that you, in common with practically everybody else in the courtroom, are an aluminus of the Yale Law School?

A That's so.

Q And you are also, I gather, no stranger to these parts. According to my notes, you clerked for Judge Learned Hand and Judge Swan.

A That's correct.

Q Did you then join Mr. Berkin?

A Yes. That was in 1928.

Q Now, just to get through a few other biographical details quickly, I understand that you have been chairman of the committee on international patent copyright and trademark relations of the ABA, of the international law section, is that correct, sir?

A That's correct.

Q And you are a member and past president of

A Well, I am past president of their executive bureau.

THE COURT: What is that organization?

THE WITNESS: Those are the French letters for the International Federation of Associates of Authors and Composers.

Q Have you held an office in the Copyright Associate of the United States?

A I have been president of it, yes.

Q An organization called SCRIBE. What is that sir?

A Well, that is an organization designed to try to improve the style of legal writing.

Q Do you regard that as one of your greater accomplishments, Mr. Finkelstein?

A Well, I think that is something to be accomplished in the future.

Q You have written extensively, Mr. Finkelstein, on the subject of copyright and other legal subjects.

A I suppose you would call it extensively.

Q And I understand you are the author of the article on international copyright in the Brittanica Encyclopedia?

A Yes.

Q Have you lectured at law schools on occasion?

A Several, yes.

Q And your subject has usually been copyright and related subjects?

A For the most part. I have lectured in anti-trust cases. We taught that at Chicago and on foreign law in Soya Mentschikoff and Nick Katzenbach's class in Chicago.

Apart from that, it has been mostly copyright and that was related to copyright.

Q And I understand that you have been a member of the United States delegation to numerous international copyright conventions, is that correct?

A Yes.

Q Including the universal convention in Geneva in '52, the Rome convention on neighboring rights in '61; the Berne convention, Stockholm revision in'67; the Berne convention and universal copyright convention, Paris revision, '71 and most recently, the conference on communications satellites in Nairobi, this past year?

A That's correct.

Q You received the Ribhard Strauss medal for distinction in international copyright in1971, is that correct?

A Yes.

Q Now, Mr. Finkelstein, just in the interest of background, we are all familiar with something called the amended final judgment in U.S. against ASCAP entered on March 14, 1950.

Could you trace for us the history behind that document?

A The Society had lost the Alden-Rochelle case that involved --

Q Could you go back farthern than that? The amended final judgment is an amendment of a judgment entered in 1941?

A Yes. The Society's antitrust problems with the Government commenced in September 1934, when a contract was about to expire with the broadcasting industry and we would consider the pressure from the Department of Justice as something brought on bythe broadcasting industry. I saw that is the way we look at it.

And a complaint was filed on September 1934 and that was tried before Judge Goddard in June of '35. Before the Government completed its case, it asked for an adjournment to stipulate the facts and we were stipulating facts for several years when, in December of 1940 or before that, it first came to my attention in December of 1940,

there was talk -- that was in December of 1940, there was talk of working out some consent inthat old lawsuit. It was still pending. It didn't come to my attention until one day in December I was asked to draft a consent decree along certain lines and I said that was the first I had heard of the thing and I didn't -- I said to my then partner, who had brought it up to me, that this wasn't something that I had worked on and I thought that he might draft it himself and the result was that after a discussion in our firm we decided not to go ahead with that decree.

Then an information was filed, criminal information under the antitrust laws, filed against ASCAP and BMI --

THE COURT: Subsequent to the proceeding you described so far?

A Yes. That was returnable in Milwaukee. At that time, Thurman Nyland was head of the antitrust division and he had it returnable in Milwaukee, which we had nothing to do with. I mean, we didn't have an office. We had a representative out in Milwaukee, but we didn't have an office there.

It was filed inMilwaukee because the Judge out there at that time was a Judge who when he was a United States Senator --

Q Well, Mr. Finkelstein, forgive me --

A Right.

Q Let's keep that out of this record.

A Anyway --

Q There was a criminal information filed in Milwaukee?

A Yes. And there was -- that was worked out by agreement that would be -- there would be a nolo contendere approach and worked that out by fine and then there would be a consent decree entered in New York because New York was the area in which the district in which the original suit had been filed.

Now, of course to have a consent decree entered, you have to dismiss the original suit. Otherwise, the provision of the statute that provides that a decree entered by consent shall not be res judicata by the third parties wouldn't apply. Testimony had been taken in that case, so that suit had to be dismissed and a new suit filed. That suit was filed in 1940 and on March 4, 1941, a decree was entered by consent in this court, and that provided that in addition -- that theSociety should mak available to all broadcasters a per program form of license and that the Society should -- the Society's members instead of granting exclusive rights as they had theretofore, would grant the

Society non-exclusive rights, but the Society could impose certain conditions on licensing by the members.

A time came later when the motion picture people -- that worked until 1948, when there was another --

Q Before we get that far ahead in time, Mr. Finkelstein, you mentioned BMI having been a party to a lawsuit also.

A Yes.

Q When was BMI formed?

A BMI was formed under these circumstances--when this--

MR. HRUSKA: Your Honor, I object. I believe the question from counsel was when was BMI formed and Mr. Finkelstein has just indicated by his topic sentence that he plans to go into the reasons why BMI was formed.

THE COURT: Well, we have a long history. Do you want to just tell even when BMI was formed.

A 1939.

THE COURT: If Mr. Topkis wants to bring out other matters, he can, of course.

Q And Mr. Finkelstein, BMI was of course formed by the Broadcasters?

A Yes, it was.

Q There came a time when all the four radio networks stopped using ASCAP music.

When was that, sir?

A That was November 1st, 1940.

Q Were they at that time in contractual relations

Q Were they at that time in contractual relations with ASCAP?

A Yes, they were.

Q And when were those contracts to expire?

A December 31, 1940.

Q What happened?

A The Broadcasting industry stopped using ASCAP music on November 1st so that they could--presumably, so that they could, would be prepared for the time when they would have no right to use the music or for whatever reasons.

Anyway, they stopped using ASCAP music November 1st. Then the contract expired.

There were no negotiations with the broadcasting industry for quite sometime after that--

Q Just so that we may have the chronology straight, on March 4, '41, next succeeding, the final judgment was entered in U. S. against ASCAP?

A Yes.

Q What happened then, if anything?

A Yes, by the way, I mentioned the next in the period of 1941 and I left out one provision--that the society was to make available to the networks a license that would cover all their affiliated stations for simultaneous broadcast of network programs.

Before 1941, the networks didn't have a license from the Society and the affiliated stations had to pay license fees for the network programs.

In fact, that was one of the issues between ASCAP and the broadcast industry that brought on this crisis in 1940-'41.

ASCAP wanted the networks to commence taking a license for the networks programs because the stations had rebeled against paying ASCAP for music they didn't originate and the networks resisted making any payment.

So, part of the 1941 decree had a provision in it not compelling the networks to take a license that would cover all its stations but compelling ASCAP to make it available annually.

Now, you asked about March 4, 1941. The decree was entered and ASCAP thought at that time that that would open the way for negotiations with the broadcasting industry. Nothing happened for some time and the first network that made any application or started any discussions responded to the Society's request for negotiations, was the mutual network and in about May of 1941, Mr. McCosker, who was then president of the mutual network, had some discussions with ASCAP that resulted in an agreement but none of the other networks came through and mutual wasn't--it turned

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out that Mutual didn't have much bearing on what was going to happen with all the other networks combined deciding not to take a license and we didn't work out a license with the other networks, or with the rest of the industry until October 29 of 1941, when we signed an agreement effective November 1st, 1941, with NBC and CBS.

NBC at that time had two networks, the Red Network and the Blue Network.

That put the music back on the air. The stations came along right after that.

The NAB approved that contract, the National Association of Broadcasters.

Q That's a trade association?

A That's a trade association of the broadcasters.

Q Do I understand that during all of this time, from November 1st, 1940, until November 1st, 1941, then, CBS and NBC were not using any ASCAP music?

A That is correct. We monitored them pretty closely because we would have liked an infringement suit against them but we couldn't find a single use.

Q Was that true of local stations as well as the networks?

A That was true of local stations, too.

Q So, as of November 1st, 1941, you got contracts

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with CBS and NBC and you said that previously the networks had paid you nothing for programs that they originated.

A That's correct.

Q Did these few contracts provide for network payment?

A Well, the new contracts were with the networks and they did provide for the networks paying for programs that they had originated.

We were offering per program licenses under the '41 decree at that time but the networks all said that they would not apply for the program licenses, that they were committed to a blanket license.

There were about 600 stations, as I recall it, individual stations, at that time, and a hundred of those stations, approximately a hundred, too a per program license and the remaining 500 a blanket license.

Q Do you recall the rates that were provided in the network licenses at that time?

A Yes, I do. We asked for--this was before the music went off the air. We had asked for a revision of our rates this way--the rates had been five per cent for all stations and of course there was no charge to the networks. We offered--

THE COURT: Five per cent of what?

A Five per cent of their income from advertisers, less cettain deductions--deductions for certain expenses, advertising tables, discount and certain things that were provided for in the contract.

THE COURT: Right.

A We proposed a new agreement in 1940 that would lower the rate to 3 per cent for the smaller stations, four per cent for the intermediate stations, five per cent for the large stations and seven and a half per cent for the networks which hadn't paid anything up to that point.

At the conference, at our conference with the respectives of the industry and the networks, Mr. Kaluber, who was then executive vice president of CBS, when he heard the proposal, it was read at this meeting, he asked Joe Ream, who was his young assistant or he directed him to get his hat and he stalked out of the room and we didn't hear from CBS or any broadcasters after that, until BMI we learned had been formed before that but that was the thing that activated BMI.

That was the response and the music--

Q What rate was adopted in these new contracts that went into effect in 1941?

MR. BRUSKA: Your Honor, I do object. I don't see the relevance of going through the rate negotiations between ASCAP and networks and broadcasters in 1941. If it were relevant, I would imagine that the contracts themselves would be the best evidence of it. I really don't see its relevance.

I would object on that ground.

THE COURT: Do you want to comment on that?

MR. TOPKIS: The contracts are available and we propose to offer them. I just wanted Mr. Finkelstein to fit them into the chronological pattern.

THE COURT: I think the view that I should have adequate background applies to both sides so I will hear Mr. Finkelstein provided we don't bog down in it.

MR. BRUSKA: May I oppose a corrollary objection to your Honor.

Mr. Finkelstein has been describing from time to time in his testimony, although not perhaps literally called for by questions, reactions, statements, by people on the other side of the bargaining table.

I think those statements are hearsay and I would like--

THE COURT: I certainly don't recall Mr. Finkelstein's statement as binding on Mr. Klauber or Mr. Palley or anybody. I don't think he does either.

MR. TOPKIS: I can assure your Honor that Mr. Finkelstein entered upon his service with ASCAP, he was a trial attorney and knows the hearsay rule as well as at least anybody on this side of the table.

THE COURT: All right. We are trying to find out what the rates were in the new contract; isn't that right?

MR. TOPKIS: Yes.

THE WITNESS: The rates were, as I recall it, two and a half per cent for the networks and two and a quarter per cent for the stations.

Q Mr. Finkelstein, at that time did you enter into any license agreements with the networks relating to television or about that time?

A Yes. The agreements that were worked out provided that there would be no charge for television unless and until ASCAP gave notice that it was going to make a charge.

The contract provision would speak for itself. It was understood that until television developed commercially ASCAP would not--substantially would not make a charge for television.

Q But there would be a license?

A There was a license, yes.

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Q Given, granted to all broadcasters?

A Yes. It was written into the contract.

Q Mr. Finkelstein, in United States against ASCAP, the action in this court, there was an amended final judgment entered on March 14, 1950.

Can you briefly trace for us the background of that?

A Yes. There had been a question about--raised in a lawsuit here--Alden Rochelle against ASCAP. The question arose as to whether the Society could charge the motion picture theatres for music in the films they exhibited or whther there was a combination in restraint of trade to--between ASCAP and the motion picture producers to refrain from licensing performing rights at the time that syndication rights were licensed to motion picture producers.

That issue was decided by Judge Libel against the Society and we then had discussions with the Department of Justice about changing the existing consent decree. That decree was changed at that time in these respects, first as to motion pictures, performing rights licenses were to be made available to the motion picture producer at the time syndication rights were granted, be made available either by ASCAP or the member.

Secondly, if there were any disputes between the

society and any user as to the reasonableness of rates, the user could get a license by making an application to the Federal court.

THE COURT: Any user?

THE WITNESS: Any user, that's right, could get a license merely by making an application to the Society in writing. That application would give him the license for full period during which either he or the society apply to the Federal court for the determination of a reasonable rate.

A (Continuing) We went along with that because we believed that the public was entitled to be protected against a squabble between ASCAP and users as happened in 1940, '41 where the public was deprived of access to all this music.

So we submitted to that kind of regulation. There were some other provisions. The Society gave up its right to impose conditions on licensing by the members except that the member wasn't to license anyone except a user as defined in the decree itself. That is, the member couldn't--an ASCAP member, for example, couldn't give BMI the right to license its works but he could give the right to a user.

Q And I understand it was at that time that the provision was inserted into the decree barring the Society

from licensing individual works except with the consent or at the request of both the user and the member in interest or members?

A Yes, in other words, any user who felt that he could get along on the basis of licensing specific works and didn't need this whole repertoire was to have the right to deal directly with the members without the Society's interference.

The only way to be sure there was no interference by the Society was to enjoin the Society from issuing licenses where you had that situation, where the user felt that he could get along by licensing--by arranging his licensing directly with the members.

It was Mr. Tim Berk's thought at that time that if a user--

Q Mr. Finkelstein, I think we better--

A I can see the objection to that I'm sorry.

Q Let me go on, Mr. Finkelstein.

Do I understand that it was subsequent to the entry of the amended final judgment on March 14, 1950 that the first contracts were signed between ASCAP and the broadcasters relating to television?

A Yes. I don't think I mentioned that the 1950 decree provided--extended the provisions to television.

Q I see.

A What was your question, please?

Q My question is: Was it subsequent to the entry of that decree for the first time ASCAP entered into fee bargaining contractual relations with the broadcasters?

A No, I don't think so. I think we started that in 1949.

Q Your first contracts?

A Well, we started our negotiations in '49. The contracts may have not have been assigned until later

Q No matter.

A I don't remember whether it was '49 or '50.

I don't think that the decree itself had anything to do with--I just don't remember.

Q All right.

Mr. Finkelstein, ASCAP, of course, licenses this record reveals to everybody who comes along, including broadcasters, local and network, radio and television, background music, general licensees including hotels, restaurants, bars and taverns, symphonies, circuses, intermission music at theatres, dance halls, skating rinks, stores, shopping centers, et cetera.

My question to you is, as to all of those licenses, are they blanket in access in that they offer the

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entire ASCAP repertoire to the user?

A Yes, they are.

Q So far as mode of payment is concerned, are they blanket in terms of being unrealted to use?

A There is a concerted schedule that offers an alternative of either paying on all concerts or paying only on those concerts that have ASCAP music in them. A presenter of concerts might not want to bother with whether a particular concert has ASCAP music in it or not and pay a lower rate but pay on all the concerts that he gives, or he may say, I only want to pay on those concerts that have ASCAP music.

It sought of corresponds to the program--

THE COURT: It doesn't depend on the actual amount of music used even in those cases?

THE WITNESS: No, it doesn't, your Honor.

Q Under all of these licneses you get some kind of fee, either a flat dollar amount or a fee fixed pursuant to a formula?

A That's correct.

Q Or a percentage?

A That's correct.

Q Going back for a second, Mr. Finkelstein, as to the terms of the amended final judgment.

Does a member of ASCAP have the right as the Society user to bar the use of his music by any particular licensee or is he obligated to make it available to all licensees?

A No, he does not have the right to bar the use of his music by any particular licensee or any particular program or any particular artist.

THE COURT: In other words, he doesn't have the right to bar the use of his music at all?

THE WITNESS: Yes, he does, your Honor. He has the right to put on a restricted list in radio--I think it is not more than 750, television, not more than 500 compositions or the other way around, whichever it is, for the purpose of safeguarding those interests that he reserves to himself.

He authorizes ASCAP to license only non-dramatic performances, but if he writes for the theatre--he may have written a play that was shown on Broadway, he may have just sold the motion picture rights, he may not want the music in that play to be broadcast at a given time or it will impair the value of the movie contract. He can place those compositions on the restricted list.

Now, you would say, how do you manage to have it limited to 500 or 750?

When it gets close to that number we call in the

members whose works are on the restricted list and we say we are getting close to the line, what compositions on this list can you take off the list?

So we manage somehow to conform to that part of the agreement.

THE COURT: All right. Thank you.

Q Mr. Finkelstein, are there performing rights licensing enterprises, to use the most neutral terminology that I can think of, in one way or another resembling ASCAP's right around the world?

A Yes, in every developed country of the Western world, every country that has international copyright relations under either the universal copyright convention or the Berne convention, yes.

Q You speak of the Western world. Is there a performing rights licensing operation in the Soviet Union?

A The Soviet Union has a union of Soviet composers and they tell me that they are paid on the basis of their performances over there, but the Soviet Union has just gotten into the universal copyright convention and they haven't set up their machinery yet fordealing with either performing rights or any other copyright rights internationally.

Q Throughout the copyright recognizing world, the world in which performing rights are licensed, is there a particular form of license which predominates?

A Oh, yes. They are all blanket licenses throughout the world.

Q Blanket in terms of access?

A They are all blanket in terms of access and they are blanket in terms of payment. They may be different

from ours, but -- for example, concerts are paid for on the basis of box office instead of formula that we use at the request of the symphony orchestras, which is the amount paid to the members of the orchestra and the conductor.

Japan has a combination of payment on a use basis and blanket basis, but it doesn't seem to work and they are trying to revise that.

They are discussing it right now.

Canada has a per composition basis of licensing for concerts and that kind of thing. Nobody ever takes it.

Q In countries where there is commercial broadcasting, Mr. Finkelstein, is there any generalization that can be made as to how license fees are set?

A Well, I already mentioned the special problem in commercial broadcasting. Most of the countries don't have it.

I don't think that you will find a distinction between commercial broadcasting and -- for example, in England BBC, the British Broadcasting Corporation, they pay an amount calculated on the basis of a percentage of the licensed fees paid by users. In each home if you have a receiving set you pay the Government a license fee and that is used -- that goes into BBC, it supports it.

They go there not to profit under their law, they recognize an obligation to pay. They pay on a blanket basis. I don't think you will find a distinction between commercial and non-commercial broadcasting.

Q All right.

Mr. Finkelstein, according to your understanding, are there any circumstances which explain this universal employment of a blanket license?

MR. HRUSKA: I object, your Honor. I think we are really ranging very, very far afield here. The lawsuit does not depend on or is it relevant to determine what is done in other foreign countries, why it is done in other foreign countries. We all know the antitrust laws are different in foreign countries from the antitrust laws that we have here, to the extent foreign countries have any antitrust laws at all.

I did not get up for the last several answers, questions and answers. It seems to me this is the time to put an end to this area of inquiry .

THE COURT: I am inclined to think that the question done elsewhere may be relevant.

I am sure Mr. Finkelstein's opinion would be as competent as anybody's in the world on the subject, his opinion as to why this is so -- is relevant. Can you

tell me what you think the relevance of it is, Mr. Topkis?

MR. TOPKIS: I think that there must be some explanation of why throughout the history of copyright licensing and public performances and music everybody has thought that the blanket license was desirable and nobody has --

THE COURT: Everyone once thought the world was flat, too.

MR. TOPKIS: Yes, but that was a mistake which it was capable of demonstrating by sailing or if you want to take the ptolemaic view, by astronomical observations was false.

We have no imperial evidence by which to determine whether per use is good or bad. All we have is guesswork. I would suggest that the fact of universal experience with the blanket license and its experience, not guesswork --nobody after all had sailed to the edge of the world and fallen off, but the fact of universal use of blanket license is, I think, a very important one, the fact we have and perhaps we have also a consensus as to why it is desirable.

If Mr. Finkelstein is qualified as I believe he is to explain that consensus, I think it might have some use to your Honor.

THE COURT: Without cutting you off, Mr. Hruska, I think I will hear Mr. Finkelstein's view, Number 1, recognizing it is opinion; Number 2, with skepticism; Number 3, realising there are intangibles involved in this case, including questions of economic motivation raised properly by CBS and I gather going to be discussed also by counsel for ASCAP.

I don't think it will hurt anybody if I hear what he has to say.

MR. HRUSKA: I would like to make a very quick statement, your Honor. Mr. Topkis indicated that we merrily want to find out why it is that everybody is happy with the systems that exist in other countries. I think it is perfectly obvious there is no foundation, there cannot be any foundation in the examination of Mr. Finkelstein to demonstrate that everybody is in fact happy. There may be a situation where users might want to change systems in foreign countries, but cannot --

THE COURT: I agree.

There is no greater inference that can be drawn from the fact that such contracts do exist as a general practice in those countries. Anybody is free to argue from that what the inference is.

Mr. Finkelstein has been asked for his opinion

as to why he believes the blanket license is in such universal use.

A I think you start with why do you have performing rights societies and why do -- what function do they serve and how do they serve it?

With music you have something that can be performed -- we are talking about performance of music. You don't need the sheet music for the performance, you don't need a record and there is a great demand for a large number of performances of works by different people. There is no way -- no way has been found to make these works available to a user and to solve this -- this was a new problem -- to solve that problem of how you make the works available until somebody hit on the idea of an organization in which practically all works would be made available.

In other countries a single organization having all works in the repertoire and all the user has to do is go to that one source and he gets a right to use everything he is going to need. He doesn't have to have difficult negotiations back and forth, he doesn't have to worry about whether if he needs something at a given time he may not have acquired the right to use it and he has to go to some individual to get it.

For example, in the dance hall somebody is

dancing and there are a couple that have been married 25 years and they are celebrating their 25th anniversary and they want the song that was played the evening when they first met. They go up to the orchestra leader and they say, play so and so, if you know it. He can't thumb through a book of a million composers to see whether he has a license for that number.

A performing rights society makes it possible by having all the music in the repertoire to have the comfort of knowing that you can give the public anything it wants.

The only way that you do it is to have a blanket form of license.

Then for the basis of payment -- as I said, the basis of payment is a blanket basis, universally, but there is the problem of how do you distribute this money? And so all over the world there is the problem of identification of use.

We once questioned the reports that we were getting from foreign societies as to the use of American music abroad, and we sent an accountant over to go to a number of places and observe the use of music and then, for example, in France they post -- the next day they get

this is Austria, a lot of other countries, they get the next day a sworn report signed by the orchestra leader telling what performances he had that evening and our people would go to the office of the local society. After hearing a program in which most of the numbers were American, we would find a report showing almost nothing in the ASCAP repertoire being reported.

This is where they are not paying on use. They don't gain anything by not reporting the use under a blanket license, but they know that the orchestra leader knows that his friends, composer or publishers, whatever, will be paid on the basis of what he puts down on his sheet and if you have -- if he had a per use license, for example, and it is impossible to check on all these uses. there would be -- you would have this problem of the correctness of the reporting of the uses. It isn't anything hypothetical with us. We went through it with a program license.

THE COURT: Well, I think we shouldn't get into the figures of other types of licenses unless Mr. Topkis asks you to or until Mr. Hruska cross-examines you, if he does, on the subject.

I understand your reasons for explaining why the blanket license is so widely used.

Q Now, Mr. Finkelstein, when the networks and ASCAP first signed television licenses that involved payment of money in 1949, when those negotiations got under way, how did the subject of blanket licensing come up?

A We had a negotiating committee and the broadcasters had one. The chairman of our committee was Oscar Hammerstein and he was chairman very largely, apart from his own unusual abilities, he was the leading, what we call production writers, the writers who write for the stage --

Q The question is how did the subject of blanket licensing come up?

A It was in a discussion with the negotiating committee, between the broadcasters, headed up by Bob Beyers, for NBC and us.

Hammerstein said that for television, if they showed anything of his that came from one of his plays, if they used costume or scenery, he wanted to license that on his own. He didn't think that ought to be part of a

blanket license and the broadcasters said --

MR. HRUSKA: Your Honor, I would like to interrupt this. I believe that Mr. Finkelstein should not be giving testimony about what various people said to him in 1949.

THE COURT: I don't think he said he even said it to him. I don't understand the relevanceof this.

MR.TOPKIS: My question is very simply, who wanted the blanket licenses, the broadcasters or ASCAP.

THE COURT: You didn't quite put it that way.

MR. TOPKIS: I was trying not to lead as much as I could avoid it.

MR. HRUSKA: Well, your Honor, I would caution on this question, I don't think Mr. Finkelstein should be testifying about what broadcasters said. I believe that would be hearsay evidence.

MR. TOPKIS: I will qualify that, your Honor, if Mr. Hruska will indulge me for a moment.

Q Mr. Finkelstein, the discussion that you are reporting, was CBS represented?

A Yes.

Q It was a meeting between representatives of the three networks and ASCAP?

A Yes. Now, wait a minute. I think Mr. Braun

with whom I was speaking at that time for CBS, told me to -- that Bob Meyers was authorized to speak for them, before anything was concluded, he would want to take it up with me after that.

MR. HRUSKA: So that is what I mean, your Honor. I think a statement like that is a hearsay statement and in terms of what Mr. --

THE COURT: Who was the person you just quoted? Who did you say said that --

THE WITNESS: Julius Brauner. He was secretary of CBS or something at that time.

THE COURT: That statement would not be hearsay vis-a-vis CBS, the statement made by one of his officers to Mr. Finkelstein and reported directly by him.

However, I don't want to, on either approach to the thing, be highly technical. It must be possible for us to learn and I don't know whether you dispute the expressed major desire for such a license. This is all assuming, of course, that even that factor is relevant.

MR. HRUSKA: I was just coming to that, your Honor. I don't know what the facts are in 1949, but I do believe that, as I indicated before, the discussions, I think, held in 1949 regarding these negotiations, have no relevance to the case today.

THE COURT: Well, I doubt that they do, but I also feel that we are spending so much time arguing about whether they do and that it is conceivable when the whole picture is laid out, that someone may wish to argue to that effect.

But, can we get across this point now?

Q Yes. Please, Mr. Finkelstein, and this was, after all, before the amended final judgment of 1950, which bars ASCAP from blanket licensing except on explicit request of a user.

Now, the question is, in these negotiations which took place before 1950, did ASCAP or the broadcasters want a blanket license for network?

A The broadcasters insisted on it.

Q Mr. Finkelstein, throughout your tenure with ASCAP, I gather, ASCAP has been in the contractual relations with Columbia Broadcasting System relating at first to its radio stations only and, then, to the radio stations and network and also the television, is that right?

A Yes.

Q And just to capsulize, those contracts have always been blanket contracts?

A They have been.

Q In the negotiations which you have engaged in

with CBS down through the years, Mr. Finkelstein, aimed at setting new rates from time to time for license fees, has CBS on occasion raised the subject of its frequency of use of ASCAP music?

A Oh, yes. Every time we negotiate with them, every time a contract expires and we negotiate new rates, they raise that.

Q Mr. Finkelstein, you are aware that in this litigation, CBS is seeking what has been termed a per use license. You have followed the transcript to a degree.

A I did up to a given point. I am not sure that -- I am not really sure that I know what the per use license is that CBS requests.

Q All right, Mr. Finkelstein. I will explain it to you.

Referring to the document which CBS has given us, dated May 9, 1973, and I will try to capsulize it, the idea is that first, CTN would pay ASCAP a specified fee for each use of ASCAP music covered by the license.

Second, the fee for each use would be derived from a schedule reflecting the nature of theuse, for example, feature, theme or background, and such other factors as might seem appropriate.

CBS says that the per use fee schedule might be

as simple or as complex as seems desirable, it could provide difference prices for comparable use of different works, if that was thought equitable.

If the fee schedule would -- could not be agreed upon through negotiations with ASCAP and BMI, it would be set by the Court and the schedule would be adjusted at periodic intervals to reflect prices arrived at in the market.

In addition to the per use fee payments, provision would be made for a payment by CTN to ASCAP of a fee for the costs incurred by ASCAP in administering the per use license.

Each license or that license would cover that portion of the ASCAP repertory which CTN designated and CTN or CBS has advised us here that it would propose to designate the compositions listed in the ASCAP index of performed works with updating from time to time.

Next, each ASCAP member would have the right to withdraw some or all of his compositions from coverage by the per use license on reasonable notice.

Next, no fee would be payable to ASCAP under this per use license -- that is to say the per use license would not operate where either CBS or a program producer

had obtained a license directly from the copyright proprietor.

THE COURT: You said that ASCAP would derive no fee from this per use license but you mean from the license accorded by ASCAP member who has withdrawn from the pool? Is that what you are referring to?

I know that you are reading CBS's document, but I don't have it before me.

MR. TOPKIS: What it says, and I will read it --

THE COURT: Please do.

MR. TOPKIS: "No fee would be payable to ASCAP or BMI with respect to the use of a composition in the event that CTN or more likely a packager producing a program for CTN obtained a license directly from the copyright proprietor."

THE COURT: Yes, that is what I understand, too.

Q And finally, Mr. Finkelstein, the per use license would cover spontaneous -- that is to say, music picked up in filming news programs and other unplanned broadcasts of music, at least to the extent that such use do not constitute fair use under the copyright law.

My question to you, Mr. Finkelstein, is do you regard the per use license that I have just outlined to you

as a workable system of licensing musical compositions, copyrighted compositions?

A I can't -- the answer is no.

Q Would you explain your answer, please?

A Let's just take the last item first, payment will be made if the use doesn't come within the provision for fair use.

Now, on a per program contract we would have a mountain of correspondence on a given composition just to determine the ownership of the composition -- was it in the ASCAP repertory or was it in the BMI or was it in SESAC or whatever.

Now, you are introducing -- and we would of course continue to have that.

Now you are introducing the question of fair use. Nobody in the wide world knows today whether a given use and most of them are borderline cases, is a fair use or not. This comes up in -- could come up in parades, it could come up in news reporting; a composer dies and they pick up some strains of his compositions.

There could be a story in which they just use a few bars of something and you will find people arguing that all of those things are fair use.

THE COURT: Would you care to define for me

what the phrase "fair use" means in regard to the use of music? I think I know what it means in regard to literary property. I am right that the analogy in literary copy would be, for example, where a critic quotes a work that he is writing about and takes reasonable snatches of it?

A That would be one of the things. It came up in this way, for example, your Honor -- Liberty Magazine once had a story in which somebody, a character was listening to a radio and a song comes over the radio and they print in the story, the lyrics of that song.

Now, is that a fair use or not? They didn't get the authoirty of the copyright owner. A court held that that was fair use.

THE COURT: Then it must have been.

A Well, it was in that court. It seems to me that is something about which--

THE COURT: I've had to render some holdings about fair use, too, in a case involving Lennie Bruce's sayings a few years ago.

How do you translate that to music?

THE WITNESS: Well, here is another one that came up in court. Let's take the MAD case where MAD published some parodys on--it often comes up in parody--parodies on musical numbers and they had a song called "The Last Time I Saw Maris, and now the copyright owner of "The Last Time I Saw Paris" thought that that, with the rest of the lyrics, was copyright infringement. They sued on it. They were not successful in that case.

And these things are always coming up. It always comes up in parody.

That Gas Light case--there were two cases where the same court held one way in one case and just the opposite way in another case, that some people can and some can't distinguish.

Now, we would be having, and with, and CBS doesn't shy away from litigation--we would be in litigation constantly with CBS about whether a given use was or came within

the scope of fair use or not and if we succeeded, all we would get is just the small amount of money that the license fee provides for.

That's what happened in the per programe, you see. We lost money on every one of the per program contracts. But of course the boradcasters lost it, too.

But if we decided that we couldn't afford to spend that money, all licenses today or most of them would be per program and not blanket so that we would have to spend, in my opinion, we would have to spend all the money that comes into check on the accuracy of the accuracy of reports and then, on these questions of how do you resolve a given problem and I don't know where it would end up..

If I had before me that per use thing I would give you some other problems that it raises, if you wish me to do that.

Q I would be glad to have you do so.

THE COURT: It seems to me that's the heart of the matter. Obviously, Mr. Finkelstein's statement has to be regarded as coming from the general counsel for the major defendant but, nevertheless, he is entitled to have his say.

MR. TOPKIS: Do you have a clean copy of it, by any chance?

MR. HRUSKA: I am afraid mine is marked up, too.

MR. TOPKIS: Mine just has circles on it.

MR. HRUSKA: That's all right. Let me work from yours and Mr. Finkelstein can work from mine. We will run no risk of--

MR. TOPKIS: All right. That will leave me totally unenlightened, which is all right with me.

MR. HRUSKA: One second while we get another one.

A We start with number 1--CTN would pay ASCAP for BMI a specified fee for each use of ASCAP or BMI mustic covered by the license.

Now, we would have to have a schedule of fees. In order to get these fees, we would have to send a notice to each member telling that member that he has an opportunity to fix his rate for each use by CTN and if it goes for CTN I suppose it would go for NBC and ABC and if it goes for them, it would have to go for all stations, because they would all have to have the same opportunity.

The member would want to know, well, what kind of programs am I fixing this license fee for. We would have to let him know that he could have a different charge for a morning program and an afternoon program or an evening program.

Some member might say I want a different charge for a variety form of program than I have for a dramatic pro-

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gram, where he would have to have--the same composition can be used as a theme, as background, as feature. It could be a theme for an artist, Bing Crosby, for example, "Where the Blue of the Night Meets the Gold of the Day," the owners of that copyright and I think in that case, there are two owners of the copyright--the composer of the music, Fred Ahlert, I think he is dead--they have his--his heirs have a company for his share of the rights and then Roy Turk's widow gave the rights to somebody else so that you would have--have to get a quotation. They may have different ideas as to how the price ought to be worked out and we would have to be the clearing house through which all of this is done.

I just don't know how we would ever get to the point where we could quote a license and avoid charges by members that we didn't give them, the members who are not right in the swim of things, the same opportunity to fix a fair price that other members had.

So we would have to do all of that.

MR. HRUSKA: Your Honor, I move to strike the testimony that's just been given because I think Mr. Finkelstein has been testifying on the basis of erroneous premises. There is no statement in this short brief elements of a per use schedule and nothing has been said during the course of this

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trial, that would indicate that the fee schedule would be anywhere near as complex as Mr. Finkelstein said.

There is no provision for each member setting whatever price he wants on the ASCAP per use schedule for individual compositions. Each member of course can set whatever price he wants for his compositions in direct licensing but not under the per use schedule.

We had proposed that the schedule be based on the standard kind of breakdowns, feature, theme and background. We had also said, in effect, that if ASCAP can think of any other breakdown that is equitable, then perhaps the Court would consider that but we don't really think that is necessary.

THE COURT: Well, obviously the answer is relevant depending on whether CBS is proposing that the per use license be negotiated or rather the relevance depends on whether CBS is proposing a per use license as distinct from the direct license, be negotiated as it has in the past between the music licensing organizations and the networks with the Court to be available if the parties can't agree.

MR. HRUSKA: Right.

THE COURT: And no others, and while I must say that that is what I have understood up to this moment--

MR. HRUSKA: Yes.

THE COURT: --I don't know that that is necessarily contained in the document to which reference has been made by Mr. Finkelstein, so he is entitled to have thought what he thought.

Now, Mr. Finkelstein, do you want to review your testimony in the light of the fact that there will be a per use schedule, as distinct from direct negotiations, where a composer who has withdrawn his works from the per use pool that schedule would be made up in the future, as it has been in the past, by negotiations between the licensing organizations and the networks or, if they could not agree, then by the fixing of per use fees by the Court so that some of the things that you are talking about or have talked about would not be relevant there.

They might be relevant for single composers who did withdraw their works from the pool and who had to negotiate with the networks directly.

MR. TOPKIS: If your Honor please, this is critically important.

THE COURT: I agree with you.

MR. TOPKIS: We are now getting a change. Let me show it to you, please.

MR. HRUSKA: There is a copy here.

MR. TOPKIS: By all means, hand it to the Court.

There is this basic question. Does CTN under the per use deal pay the same price for every composition in the per use repertoire or will there be different prices depending on the quality, popularity or whatever of the composition?

THE COURT: That's correct. That question remains open.

MR. TOPKIS: That is a question.

THE COURT: I can't answer that question now. At the present time, the alternative, I mean the proposal, let's call it that, which is Exhibit 881 for identification, apparently, to which we have all be referring, leaves either possibility available.

But, that does not seem to me, and I think CTN is not only free to state what its position is but of course is bound by the statement it makes on the point it has, I have never understood that whichever of the courses might be followed, that the negotiations, the actual negotiations for the fixing of the ultimate fees would be between individual composers or groups of composers and CTN but would be between the licensing organizations and, for example, CTN.

Now, it may be that Mr. Finkelstein feels that if there may be different fees for different kinds of use in order to negotiate with CTN, ASCAP would have to confer

with its composers in the manner that he has described and if that is what he has in mind, I think that would be relevant to the proposal.

Do you understand my comments?

A I think I do, your Honor.

THE COURT: Let's be sure, now, that I state the assumed facts correctly. And then you can revise anything you have said to accord with those.

As I understand it, Mr. Hruska, and correct me if I am wrong, because you are the authority on it in the sense that it is your proposal and you are bound by it, CTN would pay the--as to per use music by which we mean all music in the list of performed works which has not been withdrawn from that pool list by the owners of the copyrights, as to such music, CTN would pay ASCAP or BMI a specified fee for each use.

The fee for each use would be derived from the schedule reflecting the nature of the use and could provide different prices for comparable use of different works if that was thought equitable, but even if different prices for comparable use of different works were part of the schedule, CTN complies that the negotiations to establish those variations as to per use music would be directly with the licensing organizations; is that correct?

MR.HRUSKA: Yes, your Honor.

THE COURT: Do you understand that?

THE WITNESS: I am not sure I do, your Honor.

THE COURT: Well, do you, Mr. Topkis?

MR. TOPKIS: I understand it. I can't conceive it, but I understand it.

THE COURT: I'm not saying whether it is conceivable or not or inconceivable.

We can't do anything more than find out whether-

THE WITNESS: I think--

THE COURT: --to deposit the proposal made by the plaintiff here so the expert witness can comment on it.

The first thing is to be sure that he understands it.

THE WITNESS: Perhaps I could ask a question.

THE COURT: I think you should ask any questions you have.

THE WITNESS: Do I understand that if a member says that, if my work is licensed through ASCAP on a per use basis, where I get only certain--a fixed sum of money, that I have no right to take any part in determining what I should get for my particular work without withdrawing from ASCAP?

THE COURT: No, it isn't withdrawing from ASCAP, as I understand it.

THE WITNESS: Withdrawing the work from ASCAP?

THE COURT: As I understand it, a disaffected member or a member disaffected or not would have the follow-

choices, and again I ask Mr. Hruska to comment if I don't understand this correctly.

He could go along with the per use sum and leave it entirely in the hands of yourself and your colleague to work out the schedule in accordance with your negotiations with the network as you do at the present time, he could withdraw his works or some of his works--those are two variations themselves--from the pool and as to those he would be complete master and he would do whatever negotiating he wished with the networks directly.

The third possibility, as I invisage it, and I'm not the architect of this plan, would be that he would say, well, I want to stick with the per use sum because I want you people to do the work, collecting and everything else for it, but I want to have a say in the first instance as to what kind of a per use schedule you draw up; I suppose act and be an advisor to you with regard to negotiations, but would have no right as I understand CBS's proposal to actually negotiate the par use fee for his work, is that correct?

MR. HRUSKA: Certainly have complete right to negotiate the per use fee for his work directly with CBS but no right to dictate to ASCAP as far as I know what fee should be charged--

THE COURT: What I'm trying to keep clear is this:

There would be two basic methods which the negotiations could occur.

One would be for the so-called per use license, the big body of material presumably any way, which ASCAP would continue to price and to license, and it would do that by negotiations directly with the network. The other would be such material as individual composers chose to withdraw from that body of material, and in the latter case the individual composer would negotiate for a price and would license.

THE WITNESS: If I went to a member and explained that to him--

THE COURT: Are you testifying or are you asking a question?

THE WITNESS: I would hope I'm testifying.

THE COURT: Are you reacting--

THE WITNESS: I'm reacting.

THE COURT: All right.

You can be seated, Mr. Hruska.

THE WITNESS: If I went to a member and just communicated to him what I just heard here, he would say: What you are saying to me is that I have to withdraw--I have to serve a notice now withdrawing this work from the ASCAP repertoire, so if I want my own price, if I want to nego-

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tiate my own price of fix my own price, it is my copyrighted work and I have a right to do that, and nobody has a right if I'm dealing individually to impose any limitations, and I suffer a lot of limitations when I deal through ASCAP because I can't choose my customers.

I must accept whatever comes to me through this pool because the price is fixed collectively.

Now, the price is going to be fixed on an individual basis. The only way that I can--now we are on an individual basis for price fixing. The only way that I can enter into this is by withdrawing my work, the only way I can be a party to it. If there's a rate proceeding and the question comes up--the members of ASCAP don't come down to a rate proceeding, I represent all of them.

So that if it goes the ASCAP route, he has nothing to do with fixing the rate for the individual work.

So he had to withdraw the work from the repertoire, have something to do with that. He's going to get paid on an individual basis.

He says, well, look, when Warner Brothers withdrew that great big catalogue, what happened? The networks, the whole broadcasting industry stopped using Warner Brothers works and they didn't use it for seven months until Warner Brothers came back into ASCAP, and withdrawing these works

from the repertoire is a preparation for a boycot of all my works.

How will I explain that? I don't know anyway that I could successfully explain that to a member of ASCAP as serving his interest, if I ever agree to this kind of an arrangement.

THE COURT: I'm not expected to comment on that at this stage, I will comment on that in my opinion.

I think this might be a good time for a morning break.

(Recess.)

Q So, Mr. Finkelstein, we are asking for your comments in two areas.

First, we will ask you to assume that ASCAP is negotiating a per use license with CBS and the license is going to call for different prices to be paid for different compositions.

Do you have that idea in mind?

A Yes.

Q All right. In that situation, Mr. Finkelstein, would you see any difficulties presented?

A You mean that ASCAP could set forth a different price for different compositions?

Q Yes.

A As long as ASCAP made the determination?

Q ASCAP rather than the individual members.

A Rather than the individual members?

Q That's right.

A Oh, I could never explain to Richard Rogers why I fixed a certain price for his work and another for Irving Berlin, for example, or why I decided that one of his works was worth more or less than another. That couldn't be done as a practical matter. We can't make judgments about the values of individual works. That is why in the distribution

system you have to have the same amount being distributed to each member regardless of the worth of a particular work for a particular use.

Because we can't make those judgments, the member has to -- all members have to accept a distribution system that provides for the same payment for a particular use without giving values for different compositions. The system wouldn't be workable in the distribution part and for the same reason it couldn't work in the licensing part if ASCAP fixed different prices for different songs for the same kind of use.

Q Now, let us suppose, Mr. Finkelstein, that you are negotiating a per use license, you on behalf of ASCAP, you working as ASCAP's negotiator, you are negotiating a per use license in which the same price will be charged for use of any work covered by the license.

Would you see any difficulties presented in that negotiation?

A Yes. If the payment -- if the payment unlike the distribution system , which is something among the members and they make concessions to each other in distribution -- but if the licensing -- if it involves a selection by the user of what he is going to take and he is going to pay now the same price for every work on the basis of the

individual work and there has to be the same price for every work, I just can't conceive of being able to get the members to do that. If you are going to have -- if you are going to have a world in which you have collective licensing, that has to be something in which the -- you take into consideration that you have collective licensing not just to accommodate the members -- surely it is to accommodate the members, but it is also to accommodate the user because bear in mind the member is giving up a great deal for this accommodation. He is giving up in order -- I thought Mr. Hruska was getting up to object.

THE COURT: So did I.

What is it?

MR. TOPKIS: I thought he was just stretching.

MR. HRUSKA: I was going to get up, your Honor.

The testimony by Mr. Finkelstein regarding what members are giving up seems to me to be getting very, very close to oral argument in the case. I understand the problems in eliciting testimony from Mr. Finkelstein and the fact that there is a rather thin line here between Mr. Finkelstein's opinions on matters relevant to the case and oral argument.

Every now and then we go a little beyond it. I think this is an area in which we are doing just that.

THE COURT: I would prefer to hear if it is possible from a member or two as to their reaction to this than to have Mr. Finkelstein's opinion of the reactions of the members, although I don't doubt that his opinion would probably be very sound.

Are you planning to call any person in that capacity?

MR. TOPKIS: I hadn't intended to, your Honor.

THE COURT: I only mean if you consider that such testimony is important to your case.

I think Mr. Finkelstein is quite entitled as one of the chief negotiators I assume in the past, and probably for the future for ASCAP, to indicate to the Court and all of us what he foresees is the difficulty of any of these proposals from his own point of view.

I will accept what he has to say about the members as being evidence of the truth that he believes that. If those facts are to be put before me as being true, that members actually feel that way, I think I ought to have some testimony from members.

MR. TOPKIS: We are engaging here in forecasting after all. I think --

THE COURT: The forecast is only as good as the premise on which it is based prove to be true.

MR. TOPKIS: He having dealt with thousands of ASCAP members down through the years, I think is far more reliable a forecaster than an individual two or three members.

THE COURT: Well, that may be argued. I will receive the evidence.

Will you go ahead, Mr. Finkelstein?

A I was mentioning what the member gives up to make this whole thing possible. The member has a copyright that gives him exclusive rights and we, counsel for ASCAP, entered into a consent decree under which we agreed that those rights, when exercised collectively, would be subject to certain limitations.

Now, first, the member cannot -- the member just cannot, under the Society's arrangement, accept an exclusive grant from the member nor can the member say to the Society, I don't wantyou to license somebody, or at the present time he couldn't say, I don't want you to license this work to CBS, regardless of what the reason is.

THE COURT: I understand that.

A And I am asked to comment on a world in which these things would be changing. And I think that I have had a lot of experience with the members and with the

problems that have come up over the years that bring us where we are and that make it possible or would make it, in my opinion, impossible to license the right of performance on a given basis.

I could be wrong about -- I could be wrong about what the consequences would be, but in dealing with members, I have had a lot of dealings with them.

Every time we change anything in the distribution system, we have commonns -- first, we have the 24 members of the board in the board room, each of whom represents a different point of view, expressing their views about what can or should be done or how their works are going to be licensed; we have one right now where we are proposing a change in distribution on morning programs, where the Society's board of directors came to the conclusion that a disproportionate amount of money is going to those programs and we will have court hearings about the changes because we can't make certain changes without court approval, and here we are getting into a very basic change in the administration of the rights and in payment for the rights.

The distribution under this proposal would be --

THE COURT: We are back to this lawsuit now? Are you talking about this lawsuit?

A Yes. In this --

THE COURT: Right.

A Now, we have a proposal here that the distribution system are changed so that it corresponds, so that it shall correspond with the licensing system and we would have to -- we can't separate the two things out now.

The two things would become inseparable.

THE COURT: Let's get that straight now.

Mr. Hruska, I would like your comment to whether the CTN proposal would necessarily require ASCAP to distribute the funds received from CTN or the networks as you see it in any particular fashion as distinct from its being paid in a particular fashion.

MR. HRUSKA: It would not.

THE COURT: I think it is important to understand that, Mr. Finkelstein.

While CTN and, if this were to go into effect, the Court would have stated that the payment by the user for the use of music would have to be on a per use basis, there is nothing, as I understand it, inherent in the proposal which would require ASCAP and its members to distribute the funds received in the same manner.

A I see. So there would be no judgment that that really reflects the value of the --

THE COURT: What your members reaction might be

as to charging CTN $100 for one song and $50 for another, but you would not necessarily, in accordance with the proposal as I understand it, have to distribute the 100 and the 50 in exactly the same way to your members?

A Well, we couldn't, we just couldn't -- there would be no way of the Society agreeing to charge $50 for one song and $100 for another because that kind of a judgment cannot be made collectively.

THE COURT: Then you have the other option, of course, of charging $100 for all songs of the same category of use, for example.

THE WITNESS: Yes, and then so that there would be no possibility of -- because I was talking about the member having something to do with the fixing of the price, if you had a payment for use, but now we can't have the member, who ultimately is the --

THE COURT: I tried to make a distinction before there. As I see it, while it would be ASCAP's responsibility to negotiate with the networks as it presently does, where per use licensing occurred as distinct from direct licensing, there would be nothing, as I see it envisaged certainly in the proposal, which would prevent you from meeting with committees of your members to set the negotiating posture you wished to take with CTN and to that extent I should

suppose that your membership would be involved in setting any new schedules that were set.

A Oh, but if it is a committee, that is the thing to be done collectively. The individual member would have no opportunity.

THE COURT: I suppose as a practical matter it would be terribly difficult for you to get in touch with the thousands of the individual members, if they were all free to come in and see you, even, or rather it would be difficult for you to spend the time with each one of them, saying what do you want to charge for your music.

THE WITNESS: That is why we have a blanket license, your Honor.

MR. HRUSKA: Your Honor, may I bring out a point of record right now which I think will clarify some of this.

The ASCAP distribution system --

THE COURT: The present system?

MR. HRUSKA: -- the present system, provides for different payments to be made for so-called qualifying works and so-called non-qualifying works used as background and theme music.

The criteria for determining whether or not a work is qualified or non-qualified consists of objective

criteria and the CBS proposal on this question of different prices --

THE COURT: This exhibit, 881?

MR. HRUSKA: This exhibit and particularly I have in mind Paragraph 2 of the exhibit -- you may recall, your Honor, that it has been our position, I think consistently from the very first day here, that we are not urging that different prices be attached --

THE COURT: I understand that.

MR. HRUSKA: Okay.

THE COURT: I think what you are implying but didn't quite finish was that your proposal, and particularly Paragraph 2, although it doesn't say so, implies the possibility of using some or all of the same criteria for distributions by ASCAP to its members which it presently does, is that right, or at least that would be not inconsistent with your position.

MR. HRUSKA: Exactly, your Honor, or if your Honor believed in fashioning this form of relief, if we get to that point, that it would be more equitable to make a distinction between songs such as on a qualifying -non-qualifying basis, that sort of distinction can be made on objective criteria and quite possibly the same objective criteria that are now used by ASCAP in its distribution

system.

MR. TOPKIS: May I inquire through your Honor, then, are we dealing, then, with three possible courses:

Course 1, the same price is charged for performance of every composition under the same circumstances --

MR. HRUSKA: Depending on the type of use.

MR. TOPKIS: I say under the same circumstances.

Course 2, different prices may be set for the same use of different songs based on objective criteria as for example whether the work is a qualified work or a non-qualified work, but in any event based on the objective criteria of some kind.

THE COURT: Mr. Hruska indicates yes.

MR. HRUSKA: Yes, your Honor.

MR. TOPKIS: Fine.

Course 3, different prices are set for different works, different use of different works, depending --

THE COURT: FActors other than the criteria just mentioned.

MR. TOPKIS: Right. That is to say subjective factors.

THE COURT: They may or may not be subjective but I would say factors that do not happen to be used at the present time.

In other words, not being the author of this proposal, and not wanting to sponsor and clearly not being in a position where I should sponsor or do sponsor, I hesitate to make comments but I do it for the purpose of trying to clarify things for us all and acting as a lightening rod--as I see it, all that Mr. Hruska is saying is that his proposal does not purport to dictate the factors that ASCAP should use either in setting its schedules or making its distributions and that there is nothing in the proposal which would be inconsistent with using him or all of the criteria that are presently being used.

Is that a fair statement, Mr. Hruska?

MR. HRUSKA: I believe, your Honor, there was one word in there as I listened to it that may not completely reflect our point of view.

THE COURT: What is that?

MR. HRUSKA: That was the idea that we would not object to ASCAP dictating the criteria to be used for making differentiations among different kinds of music, musical compositions, in terms of the payment schedule addressed to CTN.

We certainly have no objection to ASCAP making whatever differentiations ASCAP wants in terms of distributions.

THE COURT: All I said, whatever I said, was that if ASCAP were negotiating with you to establish a per use schedule, there is nothing in this document, 881, which prevents them from proposing to you that they use exactly the same criteria as they use at the present time.

You may turn it down, you may arrive at something else, the Court may impose something else, if you do not agree, but you have not foreclosed that possibility.

MR. HRUSKA: That's absolutely right, your Honor.

MR. TOPKIS: All I'm trying to do is inquire whether CBS does or does not contemplate ASCAP having the right to use subjective criteria in pricing its compositions under this per use scheme.

THE COURT: Well, I think there is a mistaken assumption in the way you put it.

As I understand it, ASCAP will be a negotiator for the establishing of schedule and if it reaches agreement, fine; if it doesn't, then, as in the 1950 situation, the 1950 decree situation, the Court theoretically would step in.

You said "For ASCAP setting." ASCAP wouldn't set in the true sense of the word; it doesn't unilaterally

set.

MR. TOPKIS: Right.

THE COURT: In that light, what are you asking?

MR. TOPKIS: Are we to contemplate the possibility that we may utilize subjective criteria or must they be mechanical criteria of the kind that Mr. Hruska suggests in referring to the qualifying works?

THE COURT: Mr. Hruska should answer that but as I understand the proposal it leaves ASCAP free to suggest any basis it wishes as a party to a negotiation for the setting of such a schedule.

Is that correct, Mr. Hruska?

MR. HRUSKA: Absolutely, your Honor.

MR. TOPKIS: Then my question is answered and I am quite content.

Thank you, your Honor.

Q Just to capsulize, let me ask this question:

Guided by the discussion which you have just heard, Mr. Finkelstein, the possibility emerges that there would be a number of criteria to be applied in setting the price for any particular performance of any particular work by CTN under the per use license.

The question that I would put to you in those circumstances id double, based on your experience, that the calculation of such different prices in day-to-day

operation would, in itself, pose certain problems for administration of a per use license?

A Yes. You would have the question of whether we have this discussion of whether a given use is an incidental use or a major use.

You would have--now, then, in a decision to determine reasonable rates, you would have to take into consideration not just the overall price that ASCAP quotes but you would have to take each price for each use and find out whether the right values, now not for distribution purposes but for charging purposes, are made for the things we call qualifying works.

We would have to consider whether we want to--for licensing purpose, make a different charge for new works than we make for older works, whether we would have a different charge for the first six weeks of a song's life than we have after that, because for the first couple of weeks, you are begging for performances and then the time comes when performances begin killing off the song because people get fed up hearing it.

I don't know whether--I don't know whether we would have to say, well, we have a different schedule of prices for--

Q No. My question is, and perhaps we are drifting

away from it, is do you think that the need to calculate specific prices for specific performances of specific compositions would itself present an administrative problem based on your experience with ASCAP administration?

A I was trying to answer that but perhaps I didn't understand your question.

THE COURT: Well, I am a little confused by the question, too, Mr. Topkis.

It seems to me to contemplate that the system would work in such a manner that each time a piece was to be used you would have to make a new calculation as to what its price was to be for that use in that situation.

MR. TOPKIS: Yes, your Honor.

THE COURT: That is not--

MR. TOPKIS: At least that is a possibility.

THE COURT: Well, I suppose that may be a possibility. That is not my understanding of the proposed structure.

My understanding of the proposed structure is that you would have a table with lots of boxes on it in which songs of a certain nature to be used for background music in a certain situation would cost X dollars and the only--I shouldn't say only--the way ASCAP would charge CBS for that, assuming they agreed which box it fell into and didn't have a problem

of whether it was a major use or it wasn't a major use, would be to look at the table and pick the price and they wouldn't have to make a separate determination every time a user was going to use a piece of music.

Am I correct in understanding that use?

MR. HRUSKA: Yes. This is what is done now in the distribution system. They do thatexact thing.

THE COURT: I am not concerned with that, however. So that I don't think that it is contemplated but perhaps there is a possibility that there would have to be individual calculations made every time the piece was used but only that you would look at the rate table very much the way today a person who makes up an airlines ticket or a railroad ticket looks in the rate table and picks it out.

He has to do something but the underlying rules and figures are all available for him.

MR. TOPKIS: Right. There is no disagreement among us but my question really is, pursuing your Honor's analogy a little farther--

Q Would you expect, Mr. Finkelstein, that there would be more or less confusion than there is in the calculation of airplane ticket prices?

A Oh, I don't know anything about airplane tickets and the prices.

MR. HRUSKA: Then that's the answer, your Honor.

A It depends what airlines you go to, I suppose. I didn't undestand your question before, I am afraid.

If you are trying to fix licenses for specific uses, you would have to find out what program the work is going to be used on, how much the artists are getting on that program.

For example, if it is Bing Crosby and the composition is Blue of the Night," that is going to be more money than "Blue of the Night Meets the Gold of the Day" for just some routine feature use or certainly--now, there is a theme that will be worth far more than another feature, and, normally, you would think of themes being worth less than a feature, so you would have to know what the use is in each case.

You can't, for purposes of selling, as distinguished from distributing, you can't fix a price without knowing about the program in which the work is going to be used.

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Q Unless you agree to accept the same price regardless of the program.

A But that would be--I can't imagine people in their right minds unless the price is way up and then you would block the market out completely. I can't imagine having the same price for all similar uses unless you had a table with a million slots on it.

Q I suppose that too is within the possible contemplation of the per use system.

Let me ask you this, Mr. Finkelstein: Under paragraph 4 of the per use proposal there is to be a fee paid by CBS to ASCAP for the costs incurred by ASCAP in administering the per use license.

Would you have any way prospectively of calculating the appropriate fee?

A Not at all.

Q Suppose I were to call to your attention the fact that Dr. Stanton testified here that he would expect that in point of fact the per use license would be used only rarely by CBS and that initially in a per use world CBS would insist that its program producers come to it with performance rights already cleared.

Would you have--

MR. HRUSKA: Just for the record I would like to

interpose an objection to that characterization of Dr. Stanton's testimony, your Honor.

THE COURT: All right.

Q ---any opinion, Mr. Finkelstein, as to whether near non-use of the per use license would make it more or less feasible?

A Well, if there's near non-use, it would seem to me that is the situation contemplated by Section 6 of the amended final judgment, that there is a user who doesn't need the blanket license, blanket in terms of licensing the whole repertoire. If it is a case of just occasionally wanting to resort to it, CBS is big enough to take care of those occasions.

The worse they could do is be infringers and that is $250 minimum damages generally for the first station that's on and ten dollars for each additional station, unless the Court finds that it is worth more than that or the damages are greater. If they are only occasional uses of that kind, I suppose CBS is big enough either to avoid it entirely as they did in 1940, '41, where they avoided the whole repertoire, not just a thing here and there, or they could just run their risk of whatever damages would be imposed on them.

It seems to me that that kind of world, I don't

know why they are talking about using ASCAP.

THE COURT: I think that's an interesting observation. I don't think that really answers the question you asked, did it, Mr. Topkis?

MR. TOPKIS: Well, I think it does, your Honor.

THE COURT: I thought the question that you meant to ask, and if not I will ask it, is this: Supposing CBS didn't do what you said but they behaved properly under whatever presumed edict comes down from this court imposing a per use system, but they came to the pool, we will call it, for only ten per cent or five per cent of their music.

In the light of the fact that they propose to pay ASCAP and BMI only a fee for the costs incurred by ASCAP and BMI in administering the per use system, do you believe that their minimal use of the pool would have any effect on the workability of such a proposed pool?

THE WITNESS: Well, presumably we would be under the old system, the existing system for all the other users but for CBS we would be on this--

THE COURT: I didn't mean that. Yes, I guess you would. The answer is yes.to that.

THE WITNESS: We would have two systems operating there. For CBS we would have all--we would have to have a battery of lawyers checking on their claims of fair use and

that kind of thing.

I just can't imagine--I can't conceive of a sum of money that is very much short of what they are paying now that would take care of all the expenses that would be involved.

THE COURT: You think the administrative fee to make this advantage possible, let's call it that, the advantage being the availability of this music on whatever terms, would be a high one and if only a small portion of their use of music came from your pool, that would not reduce the cost of administration considerably?

A It wouldn't in my opinion, your Honor, because we would have to do all the same monitoring that we would do if they used a large amount and we would have the same arguments about their non-payment, the use they said didn't come under the license. I don't see that it would--it would have substantially increase the cost that we now have very substantially.

THE COURT: The new system would.

THE WITNESS: The new system would.

THE COURT: Going beyond that, what you have said, if I understood you correctly, is whether they would under the new system use a lot of music from you or a small amount of music from you, the cost of administering the new

program would be not much affected.

THE WITNESS: That would be minimal, that's right, your Honor.

THE COURT: All right.

Q Mr. Finkelstein, his Honor referred to ten per cent or five per cent of CBS's use coming up to this per use licensing arrangement.

Supposing it got down to one per cent or even a fraction of one per cent.

Would that make any difference?

THE COURT: As to what?

Q As to the size of the administrative fee that would be necessary.

A I really would have--you know, I would be just guessing now. I would have to see how the thing works. I can't believe it would make much difference.

Q Mr. Finkelstein, suppose CBS wanted to cover or needed to cover something less than one per cent of its music used under the per use license system.

Do I understand your testimony to be that you like that those uses could be covered by some arrangement other than per use system and better?

A I think that's the situation in which the consent decree pretty much says ASCAP ought to keep out of it entirely

because we are not qualified for that kind of thing.

Q You are not a fail-safe operation?

A Yes, that's right. We are--the blanket license makes that possible. That that out and--it means licensing the repertoire when I say blanket license. CBS wants the blanket license. They want the right to use everything in the repertoire. They won't permit the Society to quote a fee for that availability.

Am I right about that?

Q They want everything within a certain part--

THE COURT: As I understand, they would want the right to use anything in your repertoire which has not been withdrawn by a composer who would be free to do so, as all composers would be.

The payment to you would be a fee for administering that plan.

In addition, there would be a payment made for the actual use of any particular composition in accordance with the fee schedule. Am I right?

MR. HRUSKA: The only difference, your Honor, is that we are not asking for the right to use the entire repertoire even with the withdrawals. We are limiting ourselves to designated compositions which for practical purpose or discussions here, we can assume to be the performed

works index and new songs as they are added.

MR. TOPKIS: Could I inquire, your Honor because that is a question I want to put to Mr. Finkelstein at this point.

Could we have some degree of indication as to how new compositions are to be added to what is covered by the per use list?

At present, of course, composition is added to the ASCAP repertoire when a composer anywhere in the world puts his pen to paper.

I would like to know so I may ask Mr. Finkelstein about its practicability how CBS contemplates that additions will be made to the compositions covered--

MR. HRUSKA: I will be happy to answer that, your Honor.

As new musical compositions come into the ASCAP index of performed works, they would under our proposal be added to the performed works--to the per use reservoir unless the owners of that work had previously given notice that they were not to be added, that is that they were to be considered withdrawn works.

In this connection, your Honor,--

THE COURT: For all members of course.

MR. HRUSKA: For all members, of course.

In this connection, your Honor, I might say that part of the contemplation of this proposal would be that I think CBS would be quite content with a situation in which writers or copyright owners would withdraw their compositions and give notice to contract in that such withdrawals had been made.

I mention that, your Honor, in connection with new music because it is also part of our contemplation, the way this should work in the marketplace, that owners of new music would be giving notice of new music to CTN just as quickly as they could for the purpose of getting that new music into the CTN computers.

I mention that in this connection, your Honor, because there may be a greater time lapse between the creation of a new song and it is going into the ASCAP index of performed works than there would between the creation of a new song and the notice given by the creator or owner of that song to CTN and, therefore, the feeding of the information regarding that song into the CBS computer system.

MR. TOPKIS: I'm helped so much by that that I'm inspired to ask a further question.

I still don't understand how--I'm really not being argumentative I assure your Honor. Your Honor will perhaps

recall that Mr. Marks testified that from the time a composition is first broadcast until its existence is recorded at ASCAP is a matter of many months.

THE COURT: Yes.

MR. HRUSKA: Six months.

MR. TOPKIS: Six months.

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THE COURT: I do remember that. That is what Mr. Hruska was referring to just now.

MR. HRUSKA: Yes, your Honor.

MR. TOPKIS: As to that six month period, your Honor, I take it the performed works index is of no utility in our knowing whether a composition is or is not covered by the per use license --

MR. HRUSKA: That assumes, your Honor, that it is necessary for this time lag to be as long as six months. Right now there is no particular incentive on thepart of ASCAP to hasten the addition of this music into the performed works index. Perhaps under a per use system such an incentive could be provided.

THE COURT: In any event, I understand that CBS proposes that if the composer wants his music to be used quicker, he should get in touch with CBS and tell them: I am willing to permit this piece to be in the pool and put it in your computer so that anybody asking about it will know about it, is that right?

MR. HRUSKA: Into the pool, yes, your Honor, or available for direct licensing transactions.

THE COURT: Either way he can make his wishes known.

MR. HRUSKA: Yes, your Honor.

MR. TOPKIS: So that the composer would have to come forward and advise CTN of its existence. There is this caveat to that statement, as I understand it. CBS proposes that any new composition would become a part of the pool unless the composer indicates to the contrary. So that if he didn't get in touch with CBS, but ASCAP picked up that piece and put it in the performed works index months later, then it would be part of the pool and the composer wouldn't have to do anything positive to bring that about, and it would be within the pool retroactively.

THE COURT: I suppose so. Don't ask me.

MR. TOPKIS: I have to ask somebody.

THE COURT: Ask the author.

MR. TOPKIS: I feel I am shooting at a target illuminated by stroboscopic light and I have to grab those flashes.

MR. HRUSKA: I don't think it is a practical problem, your Honor. I don't think producers of television programs are going to use music if they don't know about it or they can't clear in advance. If at the time a producer is putting this program together and he wants to use a particular song because he has heard about it, if it has not yet gone into the ASCAP index of performed

works, (a) there is a good possibility that the owner of the song will have fed the necessary information into the CBS computer so that that producer can get a status report on it or, (b), there is a possibility that even if the copyright owner has for some reason not done that, the producer can get on the phone and call him. That ought to be the rare circumstance.

Does that answer your question?

THE COURT: It doesn't specifically answer the question of whether there would be retroactive pool status. I think that is a peripheral question that we don't need to go into at the present time. I don't know how much good this discussion has done Mr. Finkelstein. I think whatever question you are going to put to him now should specify whatever your assumptions are.

MR. TOPKIS: Right.

Q Mr. Finkelstein, enlightened by what we have just heard from Mr. Hruska, do you contemplate, as you examine this imagined per use world, do you contemplate that the techniques that Mr. Hruska has now given us would satisfactorily handle the addition of new compositions to the repertory covered by the per use license?

A I think being a realist, that you would end up if the system went into being with CBS saying they want

the thing to work retroactively; otherwise it wouldn't make any sense at all. I think Mr. Hruska is sort of indicating that.

They want a license for the whole repertory because a work that hasn't been performed -- you know, the repertory has hundreds of thousands of works that are listed, copyrighted. They pay their four dollar, six dollar fee. but it was a publisher's dream or an author's dream and nothing ever happened to it. You forget about those works. The works that really constitute the -- the repertory for practical purposes are the works that have been performed.

So CBS says it wants a license that will cover the entire working repertory. That is all works that have been performed. The blanket license, of course -- that is exactly what the blanket license does, only the blanket license says if there is an odd work somewhere that hasn't been published, didn't get into the ASCAP index, it is covered.

Now, CBS says they want -- they would want the regular indemnity to apply.

Q What do you mean by that?

A ASCAP -- when Mr. Hruska said they would want to clear the composition, that means they want an indemnity by ASCAPthat the use of that specific composition is not going

to subject them to an infringement. If it does, ASCAP will defend the suit and reimburse them for any damages. So that would be part of this system, too.

So that if a work had -- if they heard that a work had a possible infringement claim attached to it or if an author or publisher was a doubtful financial responsibility and they wanted to use that work, they would go to ASCAP and have the ASCAP indemnity apply.

Now, I have said this -- what was your question? I just want to be sure I am responding to your question. I think you asked me considering the discussion and considering that Mr. Hruska had said something about how the new works would apply, I guess, was it feasible. I think I was responsive.

Q I think you were too, Mr. Finkelstein.

Mr. Finkelstein, I thank you very much.

MR. TOPKIS: I have no further questions.

CROSS-EXAMINATION

BY MR. HRUSKA:

Q You had given some testimony on direct examination, Mr. Finkelstein, regarding licensing practices in foreign countries.

Do you know how many of the licensing organizations in foreign countries, the ones you referred to, are

chartered bythe Government?

A Well, I don't know about being -- you say chartered by the Government. The Italian Society of the Government names the president or the directing manager, in Japan that is true. Of course, in Russia that is just a composers society. They elect their own over there. It is administered, though, by the Government.

Q Perhaps the word "charter" throws you off a bit. Let me reframe the question in terms of how many of these organizations are Governmental organizations as opposed to private organizations.

A I don't think any of them with the possible exception of Chile is a Government organization. Chile is run by the University of Chile. I don't think any of them is as such a Government organization. I don't know of any offhand.

Q They just have the officers or directors named by the Government?

A I mentioned what the Italian -- the situation in the Italian Society and the Japanese. Offhand, you might refresh my recollection. I don't think of any others where the Government -- let's take Mexico where they provide for only one society. And, you know, we can't go -- we

don't think we can reading the law go into Mexico and open up our own society. The Government doesn't name any officers or directors and they have rate making bodies in some countries corresponding to what we have here in the Federal Court. That would apply to England, Canada and Australia.

Q Would this refresh your recollection by any chance? This is a list of ASCAP's foreign licensing organization affiliates.

A I don't know about Czechoslovakia. InSweden I think the Government names -- I think there they administer product rights. I think in Sweden, for example maybe one of the other SCandinavian countries they -- even rights on behalf of the broadcasting station, network, Hungary, of course,you have the Government in there. I don't know about Yugoslavia. We have Madagascar down here. That is new. I don't know just what the situation is there. I think that's about it.

Q Do you know which of these societies, these foreign societies, have been created pursuant to legislation or are protected or otherwise governed by legislation enacted in their own countries?

A I would have to check it. I would have to run down the list and check that.

Q Do you know which of the countries listed on this list which, incidentally, was PX211 and now is an exhibit to the stipulation of facts, do you know in how many of these countries the broadcasters dealt with by the societies are Government broadcasters?

A That is true in the -- I think that is true in most countries. Now I say most, but I would have to run down the list and check each one. You know, England for example was all Government until very recently. Canada has always been, as far back as I remember, has been a dual system. The Canadian Broadcasting Corporation is a Government thing and CAB is a private group, Canadian Association of Broadcasters.

I would, since that is susceptible of checking, I would rather not try to pinpoint it right now. A good number of them.

Q Do you know which of these foreign societies administer their distribution systems by computer processes?

A I think almost all do. Certainly we do.

Q Yes, I understand that ASCAP does.

A Well, theFrench Society does, the Italian Society does, the British Society does, the Swiss Society, the MexicanSociety -- I mean I am now talking about societies I have visited and I know personally that this is so -- the German Society. I would say that most societies today of any consequence have computer systems.

Q But you do not know which societies other than the ones you have just mentioned do?

A No. I would go to Paul Marks, if that question were put to me and say, tell me, Paul, which ones.

I wouldn't consider it anything relevant for my purposes.

Q Have you ever made a study of the antitrust laws, if any, applicable to each of these countries?

A You know --

MR. TOPKIS: May I inquire, applicable to what?

MR. HRUSKA: In existance in the respective countries of origin of the foreign licensing organization.

A As you know, the antitrust laws are almost indigenous to the United States and they have just been incorporated in the common market. By and largeyou don't have antitrust laws in other countries, though they are all

becoming aware of it right now.

I was, at this Nairobi conference on communications satellites, they put a clause in, and this is tentatige, and the treaty hasn't been drawn up yet, that the protection offered by the treaty -- there is a provision, the domestic country may provide that if the supplier of the program that seeks protection is engaged in a monopoly, its satellite broadcast shall not be protected in the particular country.

It is a concept that is growing all over the world.

Q You gave some testimony on direct regarding the situation existing in 1940 and 1941. On Page 45 of your deposition which was taken in this case, and you recall being deposed in this case, Mr. Finkelstein?

A I do.

Q YOu had a statement which reads,"The four radio networks, there were three at that time, agreed that they would not take an ASCAP license and so it is true they agreed among themselves that there would be none of this music on the air."

Is that a true statement?

A Want to read that again? May I see it?

Q Yes.

MR. TOPKIS: What page?

MR. HRUSKA: 145.

A Yes, I remember that.

Q And you have no reason to disagree with that statement?

A Quite the contrary. I repeat it. And it wasn't just the networks. They got the National Association of Broadcasters to get the whole industry to join with them.

Q You said that the broadcasting stopped using ASCAP music in November of 1940.

Let me suggest to you perhaps, Mr. Finkelstein, by way of refreshing your recollection, if it is true, that they did not cease using music in November of 1940, but commenced phasing out and stopped, finally, on December 31.

A You know, you could be, depending on how you define phasing out, you could be right.

After all, we had no occasion to monitor all the use before December 31, I made that statement just on the basis of my own observation at that time.

I heard no ASCAP music and the people all were around me told me they heard no ASCAP music.

Q And that is your basis --

A From November 1, that is correct.

Q But you don't know, clearly, whether it was a phasing out or whether it was a total cessation?

A No. They announced that they would put into practice on November 1st what they would -- the reality that they would be faced with on January 1st, but I can't say they didn't use any music.

THE COURT: As I understand it, the difference that would exist, if your assumption is correct as distinct from Mr. Finkelstein, there would have been a 10-months hiatus, if you were right and a 12-months hiatus, if he was right, is that right?

MR. HRUSKA: Yes, based on what we have now. But I am about to chop off some of the ear end, too.

THE COURT: We will chop that off after lunch.

MR. TOPKIS: Your Honor, have you observed -- I think that clock is wrong. It doesn't make any difference to me.

THE COURT: All right. We will continue then for a while.

Q Now, do you recall, Mr. Finkelstein, that there was a tentative agreement reached between ASCAP on the one hand and the broadcasters on the other hand or at least the radio networks on the other hand in August of

1941?

A I have no such recollection and I was there.

Q You believe that not to be the case?

A We started working on negotiating a contract in August. Mr. Meyers and myself.

Q Do you recall that the networks recommenced using ASCAP music in August of 1941?

A No, they did not. Our members could have sued them for infringement, if they had. The Mutual Broadcasting System commenced in May, as I recall it.

Q I would like to show you a Variety clipping of the Times.

MR. HRUSKA: Perhaps since I am showing it to the witness we should mark it for identification. This is the only readable copy of this.

I will mark this as PX918.

xxx (PX918 was marked for identification.)

THE COURT: What is the date of it?

MR. HRUSKA: August 27, 1941.

Q Mr. Finkelstein, can you read that and perhaps tell us whether that refreshes your recollection as to the facts existing at that time?

THE COURT: The question is whether that refreshes your recollection as to the date when the networks resumed

using music in 1941?

MR. HRUSKA: Yes.

A No, it does not.

Q The headline of the article --

THE COURT: Don't read it into the record. He just said it doesn't refresh his recollection and he read it.

MR. HRUSKA: I would like to cross-examine him on it, even though it is not in evidence, your Honor. I will try to do so without reading portions of it. I understand the ruling.

THE COURT: All right.

Q Going back, if you can, in your recollection, Mr. Finkelstein, to August 1941, do you recall whether at that time any information came to you regarding the fact that the radio networks were to some extent resuming performances of ASCAP music?

A No. I don't recall any such information coming to my attention.

Q Do you recall reading any statements to that effect in the newspapers?

A No, I don't.

Q Do you recall whether ASCAP was surveilling radio network music in August of 1941 to determine whether

or not the networks were makinguse of ASCAP music?

A Well, I had assumed that they were but beginning in August I was spending all my time, until three in the morning, many mornings, working out, trying to work out an agreement, and I wasn't checking on use at the time, but I had heard of no change in the policy that the networks were not, other than Mutual, were not using the ASCAP music.

We were trying to work out an agreement under which they would.

Q But you do not know for a fact that ASCAP was running a regular surveillance of radio network use to determine the extent to which, if any, the radio networks were using ASCAP music?

MR. ERUSKA: Can we have a yes or no answer to that question, your Honor?

THE COURT: I take it from the last answer that he said he doesn't know it as a fact. He said he assumed so but he was too busy to check it out.

Q Is that correct?

A That's correct.

Q Do you know the relative size of the Mutual Broadcasting network in comparison to the NBC networks, which were the red and the green --

MR. TOPKIS: Blue.

THE COURT: One of those is now ABC, is it?

Q The red is ABC?

A The blue is. You know, I have forgotten that now.

Q Do you now know the relative sizes of the Mutual network in comparison to the NBC and CBS networks in 1941?

A Well, I was considerably surprised at what I learned at that time.

I thought Mutual Network was a real network but it turned out that they didn't seem to register all, from the effect they had on the use of ASCAP music. It seemed to have -- if you had a Broadway show and you were hoping that you could get your music on the air, the fact that Mutual was available didn't mean anything.

Q Did you know that Mutual's broadcasting revenues were approximately 5 per cent of the revenues of NBC and CBS?

THE COURT: In 1941?

A I didn't check that at that time, but when you give those figures it doesn't surprise me from what I learned about the effect of their having signed an agreement.

MR. HRUSKA: Your Honor, we could, I think, refer to other official statistics on this. There is

here a clipping from VArioty dated June 11, 1941, which sets forth those figures.

THE COURT: About the revenues of the networks?

MR. HRUSKA: Yes, your Honor.

THE COURT: What do you want me to do about it?

MR. HRUSKA: I would like to offer this in evidence for proof of that fact.

THE COURT: I think your conversation should be with Mr. Topkis.

MR. TOPKIS: Your Honor, I am sorry, I respect Variety but not that much. There is an official document on it, I am sure. The FCC would have something.

THE COURT: I would prefer to have something more, either stockholders reports or --

MR. HRUSKA: Very well, your Honor.

THE COURT: I don't think, however, that there is any serious dispute, again, if it is important, that Mutual alone was a considerably smaller outfit than NBC, which also included ABC or the beginnings of it, and CBS, together, in1941.

MR. TOPKIS: I would certainly be prepared to acknowledge that, your Honor.

THE COURT: I think that is the point you are trying to make.

MR. HRUSKA: Exactly.

Q Now, Mr. Finkelstein, you talked about the offer that ASCAP made to the broadcasters. I was a little confused as to whether that offer was made in 1940 or 1941, do you recall?

A Oh, it was 1940.

Q And it was a scheduled 3 per cent up to 7-1/2 per cent?

A It was 3 per cent, 4 per cent, 5 per cent for the stations and 7-1/2 per cent for the networks. That was an offer.

THE COURT: That is the one that caused the walk-out?

THE WITNESS: That's right.

Q Do you happen to recall, Mr. Finkelstein, by what percentage that offer had it been accepted by the networks would have increased the network payments to ASCAP?

A From zero to 7-1/2 per cent.

Q Zero, the radio networks?

A Yes.

Q That's right. By how much would it have increased the total broadcasting industry payments to ASCAP.

THE COURT: You mean in dollars?

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MR. HRUSKA: In percentages.

MR. TOPKIS: No. In dollars.

Q Yes. Exactly. How much would the dollars that would have been paid under this ASCAP formula --

THE COURT: As compared to what was being paid the year before?

MR. HRUSKA: Exactly.

THE COURT: Would you know that?

Q What was the percentage of increase?

A I wouldn't know.

Q Would the figure 200 per cent refresh your recollection?

A To reach that figure -- I think that that would be wrong for this reason -- the networks -- you would have to find -- you could find out just what the figure is in this way: What percentage of the business did the networks account for, what percentage was the stations and what were the dollars for those stations that were going to get it at 3 per cent, which was a reduction from 5 to 3, and what percentage the stations that were going to get it for 4 per cent.

THE COURT: I must say I don't believe so -- I am not referring to what you just said -- I don't understand what the relevance would be of what the networks

would have paid on a hypothetical offer or demand, whichever way you look at it, that never was consummated.

MR. HRUSKA: Right, your Honor. The point of this is to indicate the state of mind existing in the broadcasting industry and onASCAP's side of the table in 1940.

THE COURT: Monopolistic euphoria?

MR. HRUSKA: I don't know whether I would describe it that way.

THE COURT: I mean I don't think it would be terribly significant. The rates we know, anyway; whatever the actual dollar values clearly ASCAP was shooting for an enormous increase. At least that is the implication I get, as a bargaining position, at least and Mr. Klauber was a very good bargainer and decided the best way to handle that would be to walk right out of the room.

MR. HRUSKA: I simply want to demonstrate what it took to create this situation which Mr. Finkelstein has described.

THE COURT: All right.

Q Now, you said on direct examination that the broadcasters or the networks insisted on a blanket license.

A You misstated, I think, or you are about to.

Q Sorry. Go ahead and put it right.

A When you said the broadcasters insisted on a blanket license, we were talking about television. Are you talking about television now or radio?

Q What were you talking about?

A At that time I was talking about television.

THE COURT: Yes. As I understand it, you have been talking, Mr. Hruska, up to now about radio and the situation in which Mr. Finkelstein said that the broadcasters asked for a blanket license was in 1949, was it?

THE WITNESS: That's correct.

THE COURT: The negotiations relating to television.

MR. HRUSKA: Yes, I am sorry. I did mean radio.

Q Was ASCAP at that time, 1949, attempting to persuade the broadcasters or the networks to take a per use license?

A Oh, no. It was --

THE COURT: You don't mean per use in the sense used here, do you?

MR. HRUSKA: I mean any license providing for a system of payment on a use basis.

A No. It was the scope of the license that we were talking about.

Q Was there any form of license which ASCAP

was attempting to get the broadcasters to use other than a blanket license?

A Well, a group of our members wanted the right to reserve for their own licensing those uses in which their works were presented against any other background than a black background, it had to be scenery or where the performers had any costumes. They wanted the right to license that themselves and the networks insisted that if they were to deal with ASCAP at all, they would have to have the right to use all the works in the repertory and not just those works other than the works that were the subject of dramatic, you know, that emanated from a Broadway show because the writers of the popular songs, non-production, were willing to let their works be used with costume and scenery. At least they hadn't entered any objection of it.

But the broadcasters said if they were willing to deal with ASCAP at all, they wanted to have the right to use everything in the repertory on a blanket basis without any exception, and the use they wanted was scenery and costume.

MR. HRUSKA: This will take a bit to develop, your Honor, if you want to break now.

THE COURT: I think we should break now.

(Luncheon recess.)

AFTERNOON SESSION

2:00 p.m.

(In open court.)

THE COURT: Good afternoon.

MR. HRUSKA: Good afternoon, your Honor. I wonder if we may request a brief conference in the robing room perhaps to discuss a matter relating to cross-examination.

THE COURT: Very well.

(Discussion in the robing room off the record.)

H E R M A N F I N K E L S T E I N, resumed.

CONTINUED CROSS-EXAMINATION

BY MR. HRUSKA:

Q Mr. Finkelstein, do you believe that ASCAP should stop licensing in a particular field when the users and the writers and publishers in that field can shift for themselves?

A I have never given any thought to that and I don't know -- I wouldn't be able to answer a question put that way. I would have to have something more concrete.

Q Right.

I would like to read to you a statement and then ask you a few questions about that statement. The statement reads --

MR. TOPKIS: Could we know where you are reading

from?

MR. HRUSKA: I'm reading from PX 567 for identification, Page 4.

THE COURT: Am I to understand this is part of Mr. Finkelstein's deposition or some other document?

MR. HRUSKA: No, your Honor, this is some other document.

Q "An organization like ASCAP or BMI or anybody else should not be permitted to combine in great numbers unless there is a necessity for that combination. ASCAP is a voluntary association. By its consent decrees its activities are limited to those things for which the combination is necessary, that is, it can only license the non-dramatic performing rights because in all other fields the writer and the publisher can shift for themselves, and so can the user."

Do you agree with that statement, Mr. Fink?

A In a general way, that's a correct statement. In a general, you know -- I would want to have it reduced to concrete situations.

lb Q Do you recall giving testimony before a Special Committee of the Judiciary of the House of Representatives on September 18, 1956?

MR. TOPKIS: If your Honor please, I gather that

Mr. Finkelstein has now been confronted with a statement that he made seventeen years ago.

THE COURT: What is your objection?

MR. TOPKIS: And it is being suggested that it is in some degree inconsistent with what he has just testified to. I don't see any inconsistency. I object to it.

MR. HRUSKA: I have not suggested, your Honor, that it is inconsistent.

THE COURT: He's your witness for that; is that right?

MR. HRUSKA: Your Honor --

THE COURT: I don't think Mr. Finkelstein has indicated that he thought that ASCAP should be in existance where it isn't necessary. I am puzzled by the offer of it.

MR. HRUSKA: It is a predicate for further examination, your Honor.

THE COURT: Subject to connection. If we can move along.

MR. HRUSKA: Yes, your Honor. For that purpose, I would like to offer this document into evidence.

THE COURT: When it's connected, I will consider the offer.

Q Do you recall having testified on that occasion,

Mr. Finkelstein?

A Was that the investigation into the networks as monopolies?

Q Does the fact that it was the Special Subcommittee of the Judiciary of the House of Representatives in connection with the study of the anti-trust laws and the fact that it was testimony given in SEptember 1956 refresh your recollection as to having given such testimony?

A I don't remember the date. It's not one of these dates that I have fixed in my mind, but I remember the occasion.

Q You do remember the occasion.

You believe that was a true statement in context --

A In context I'm sure it was a true statement.

Q I would like you to assume, Mr. Finkelstein, that ASCAP and BMI are enjoined from licensing television networks.

Do you believe under those circumstances, Mr. Finkelstein, that the market for the licensing of non-dramatic performing rights could function for the television networks?

A Well, I suppose it could. After all, it functioned when they had no licenses at all from ASCAP and ASCAP had everything. I suppose if they just eliminated two of the

three, that it would function. I have no reason to

believe otherwise.

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Q Do you believe that that is an example of a market functioning, when the radio networks have terminated their use of ASCAP music?

MR. TOPKIS: Is counsel arguing with the witness, your Honor?

MR. HRUSKA: I am trying to understand Mr. Finkelstein's answer.

THE COURT: I understand that's precisely what Mr. Finkelstein said, except he didn't use the year but when you said that you believe that it functioned on one prior occasion when ASCAP licenses were not used, wasn't that what you meant?

A What I had in mind, your Honor, was that the money from advertisers didn't fall off, there was no great public demand for something else and so, in my view, from the networks point of view, the market functioned perfectly all right from their point of view.

THE COURT: That answers the question.

Q Mr. Finkelstein, let us, for the purpose of this next question, define market functioning as a situation in which the television networks and the producers of television network programs on the one hand and the owners of copyrighted music owned can make sufficient contact with each other to enable them to deal for music performance

rights and let me ask you whether you believe that the market would function in that sense, as I have defined it, in the event that ASCAP and BMI were enjoined from licensing television networks.

A Well, with the power of the networks to control the taste for music, and you are talking about television and the supply of material to the public, they can make any kind of market they want and, therefore, that market will function.

Q I believe in my definition of market functioning I had asked you to assume that the owners of copyrights, present members of the ASCAP organization and affiliates of BMI organization, would make sufficient contact with producers of television programs to enable an opportunity between producers and copyright owners to deal.

Is that the definition of market functioning which you took into account in giving your last answer?

A Mr. Hruska, you see, we are discussing this in reference to a proposal of CBS, called your per use system.

Q No, sir.

THE COURT: Not at the moment, Mr. Finkelstein. The sole question I understand Mr. Hruska to be asking at the present time is, if the Court were or if somehow or other it resulted that something brought about the fact, and I

guess it would have to be the Court, and if the Court were to enjoin ASCAP and BMI from licensing the non-dramatic use of music for television, I would take it, in your opinion would it be possible for the buyers and sellers of music or the users and producers of music to contact each other sufficiently so as to be able to deal in the sale and use of music.

A Well, we would have to take into consideration what comes into it--what takes its place. Otherwise, you can't make a judgment.

THE COURT: As I understand Mr. Hruska's question he is not assuming that anything takes its place.

MR. HRUSKA: Exactly, your Honor.

THE COURT: I mean, it is possible to theorize that if you and BMI, and that is ASCAP and BMI, were out of the picture, something else would grow up, but he is talking about the day after the injunction is entered, as I get his question, or the period immediately afterward.

MR. HRUSKA: The period, yes, sir.

A If there were such an injunction, as I see it, the three networks would decide how the business was going to be done and it would be done that way, period.

THE COURT: I think you have answered it several times that way.

A I can't see any other answer, your Honor.

Q Mr. Finkelstein, do you think, then, that the licensing of performance rights to television networks is a field in which the copyright owners on the one hand and the network users of music on the other hand can shift for themselves?

A Well, certainly the networks can shift for themselves and if the networks decided that instead of buying things on a blanket basis that they were going to deal with each writer and each publisher individually, I think that if the networks didn't use the power they have, that is, if a particular writer or publisher didn't accede to what the network thought was a fair price from the network's point of view, if that writer or publisher didn't have to worry about losing the market to two hundred stations in prime time for all his works and bear in mind that Warner Brothers lost that market for seven months when they decided they weren't going to clear on the networks terms, if you could conceive of a world in which the networks didn't have the power they have and didn't exercise that power, I would say yes, it would work all around.

Q So that except for whatyou referred to as the networks power, you believe that the licensing of performance rights to television networks is a field from which ASCAP

should withdraw?

A I didn't say that at all.

Q Well, I think you had said earlier, Mr. Finkelstein, and correct me if I am wrong, that in a field where writers and publishers on the one hand and users on the other hand can shift for themselves, that ASCAP should stop licensing.

And, so based on that logic, you would include would you, that the licensing of performance rights to television networks is a field from which ASCAP should withdraw.

MR. TOPKIS: That question has been asked and answered. That is one objection. Another objection is that it is arguing with the witness.

THE COURT: I think at this point it is argument, but I also think there are hypotheses in the second half of Mr. Finkelstein's answer which are so significant that to ask him if the networks didn't have the power that he believes they have would not illuminate the subject for me very much, because he does believe that they do have the power he believes they have.

Can we move along?

MR. HRUSKA: Yes.

Q Do you think because of the power that you alluded to, Mr. Finkelstein, that writers and publishers of music would not want to have the situationcreated in which ASCAP and BMI discontinued licensing television networks?

MR. TOPKIS: Oh, I object to that question as a matter of form.

THE COURT: No. I'll allow the question.

Would you repeat the question, please.

(Question read.)

THE COURT: I think Mr. Finkelstein was asked to direct what he thought the reactions of members of ASCAP would be on the basis of his long experience and recognizing

the limitations of any man speaking for another group, I'll hear it with the same caveat I expressed this morning.

(Question read.)

MR. TOPKIS: Your Honor, the reason I objected to that as a matter of form is that it really embraces two questions--one, would writers and publishers of music not want to see ASCAP and BMI go out of the business and, two, if yes to one, then is the reason that--et cetera.

And it is a terribly complex question. It is not terribly complex but it is somewhat complex.

THE COURT: Break it into two.

Q Do you believe that writers and publishers of music would be happy or unhappy at the prospect of ASCAP going out of the business of licensing television networks?

A Oh, I think if they--I think most of them, if they thought they were going to get more money would be very happy to have that happen and I think a number of them would say, no matter how much money there is, we couldn't give up creating works and spend all this time administering the rights and so they would be unhappy.

It would all depend I believe on who you talked to and what considerations you had. For the publishers, for the most part, it would be a matter of money. For the writers, money, yes, but they would also worry about how much

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it interfered with their exercise--how much they had to watch the publishers and all that, in exercising their rights.

Q You don't believe that writers or publishers would be concerned about the bargaining power of the networks which you alluded to a few questions back?

A Oh, I think that when they went into the question of money, that they would think in terms--the publisher, who really knows the facts, would face the reality--I hear it all the time--of if they turn down a network in what the network wants to do, they are going to be--they are apt to be blocked out from the networks.

That would mean a great lost of money if they did that.

Now, if the networks didn't have that power, if the networks couldn't buy for 200 stations at one time in prime time or block out that--that's one-third of the entire market, moneywise, and in terms of launching songs, that would be another, quite a different thing.

So that you can't divorce the two.

Q Well, Mr. Finkelstein, you testified earlier on your believe regarding a certain degree of power and we don't have to quantify it right now, in the hands of television networks.

The question is, do you believe, based on your experience in talking to writers and publishers, that they would be concerned, worried, about that power in the event ASCAP and BMI were enjoined from licensing television networks?

A Well, I know from experience, the 3M thing for example, if you make the right offer to--if you--when CBS--

MR. HRUSKA: Your Honor, may I request that the question initially be answered with a yes or no?

A I don't think it can be, your Honor.

THE COURT: I don't know that it is susceptible immediately to a yes or no but I would like as specific an answer as possible.

MR. HRUSKA: Without going off on 3M.

THE COURT: Would you read the question.

(Question read.)

A The answer is yes, they would be concerned about that power.

Q And would that concern, in your judgment, be sufficient to lead those writers and publishers to the conclusion that they would be better off if ASCAP were to resume licensing television networks?

A Not at all. It would depend on the offer they got from the network.

Q Do you believe ASCAP is necessary for television networks?

A Frankly, I don't know. I don't know, if I were a television network, whether I would consider ASCAP necessary or not, if I were the CBS television network.

Q I would like you to look at PX 13 for identification, Mr. Finkelstein, particularly Paragraph 10.

THE COURT: What exhibit?

MR. HRUSKA: PX 13, your Honor.

MR. TOPKIS: Does your Honow have a copy of that document?

THE COURT: No.

MR. TOPKIS: I don't understand why it's being shown to the witness, your Honor.

MR. HRUSKA: Because I'm about to ask him some questions about it, your Honor.

MR. TOPKIS: Not related to prior testimony, I take it? To hand the witness a document of 12 pages and ask him to read it, it seems to me --

MR. HRUSKA: I didn't ask him to read the whole document. I just asked him to look at Paragraph 10.

THE COURT: All right, Mr. Topkis. Let's see what happens before you object.

A I have finished reading that.

THE COURT: All right.

Now will you ask the question?

MR. HRUSKA: Yes, your Honor.

Q As a result of reading Paragraph 10 of that affidavit, Mr. Finkelstein, would you like to change your tesitmony in any way regarding the necessity of ASCAP to television networks?

A I would say that that Paragraph 10 conforms completely with what I have said here.

Q Do you recall the proceeding in which NBC sought a nucleus license, so called, from ASCAP?

A I do.

Q In 1970?

A Yes, sir.

Q Do you recall having characterized one of NBC's positions as the position that ASCAP is unnecessary?

A Well, I was saying --

THE COURT: Who having --

MR. HRUSKA: Mr. Finkelstein.

THE COURT: Mr. Finkelstein having said --

MR. HRUSKA: -- having characterized an NBC contention as meaning that ASCAP was unnecessary.

THE COURT: The question is whether you recall having taken that position, Mr. Finkelstein. I don't know

whether you did or not.

A No.

MR. HRUSKA: Your Honor, I would like to offer this document in evidence as inconsistent with Mr. Finkelstein's testimony.

MR. TOPKIS: Is this on the issue of credibility?

MR. HRUSKA: No, this is on the issue posed by the question, the matter posed by the question, and that is whether or not ASCAP is necessary for television networks and the reasons for that as set forth in this affidavit.

THE COURT: I will rule on that after Mr. Topkis has an opportunity, if he wishes, on redirect to ask Mr. Finkelstein why he thinks this affidavit is consistent with his earlier testimony.

MR. TOPKIS: I am at a loss to understand why it is admissible under any circumstances, your Honor.

THE COURT: I suppose a statement, inconsistent statement made by a witness on a prior occasion would be --

MR. TOPKIS: But Mr. Hruska disclaimed --

THE COURT: I think that's the only basis, frankly. It's either I don't believe what Mr. Finkelstein is saying now or I don't believe what he said at an earlier time.

MR. HRUSKA: If I disclaimed credibility as a ground, I did not mean to do that, but I do not believe that

it is the most important ground. I believe the most important ground is that the statements contained in this affidavit are admissions of a party.

THE COURT: In this case?

MR. HRUSKA: In this case, yes, indeed.

THE COURT: Is that an affidavit in this case?

MR. HRUSKA: No, this is an affidavit submitted by Mr. Finkelstein in the NBC proceeding in 1970.

THE COURT: I am willing if I am persuaded that it's inconsistent with what Mr. Finkelstein has already said to take it for the purpose of casting doubt on, we call it, credibility, but, anyway, the dependability of the opinions he has expressed here today, but not as anything else.

I will allow you before I accept it, if you wish, to ask Mr. Finkelstein any questions.

MR. TOPKIS: In the interest of economy, your Honor could I show you Paragraph 10 now and ask you now to rule on the very basis that your Honor spelled out?

THE COURT: Yes.

THE WITNESS: You have to look at Paragraph 9, also.

THE COURT: You would like me to look at 9, what you consider relevant?

(Pause.)

MR. HRUSKA: The sentences I'm particularly interested in are the first two sentences of Paragraph 10.

THE COURT: I don't see that the first two sentences of Paragraph 10 express any opinion of the witness at all. If I read it correctly, it says,"NBC seeks to justify that use of its monopoly," and that's an expression of Mr. Finkelstein as to what he understands NBC to be trying to do, and then he says, "That statement is directly contrary not only to experience" -- is it the phrase, "not only to experiance"?

MR. HRUSKA: Yes, that is the key phrase. But that phrase, coupled with the statement that --

THE COURT: I can't say, Mr. Hruska, that this esoteric material is necessarily inconsistent with what Mr. Fink has to say. You have him here live to cross-examine him and get him to be as precise as possible about his present position.

In any event, as to this particular passage, the objection is sustained.

MR. HRUSKA: I would like to make an offer of proof your Honor, that through this document in cross-examination of Mr. Finkelstein, we could establish his position taken under oath, that his opinion, experience, demonstrated that ASCAP was necessary for television networks --

THE COURT: Mr. Hruska, I have never prevented you from doing that. If you want to ask him any questions you want, such as don't you think that this is not necessary or didn't you say on such-and-such a date it wasn't necessary, and confront him as any other witness with a document which apparently is different from that, you are perfectly free to do that.

In a sense, that's what you have just attempted to do on this particular point, and I have disagreed that the particular document is inconsistent with the particular question.

MR. HRUSKA: Let me make it clear then.

Q Haven't you taken the position --

THE COURT: I must also point out, as I understood Mr. Finkelstein's answer to your question about whether ASCAP was necessary for T.V. networks, he said he didn't know, in effect, because he wasn't an officer of CBS. In other words, the answer I took to mean that the question of whether it is necessary can really only be determined from the point of view of those who are operating the networks.

Was that correct?

THE WITNESS: That's correct, your Honor.

Q Let me put it this way, Mr. Finkelstein:

Haven't you taken the position on a prior occasion that, in your judgment, experience indicated that ASCAP was necessary for television networks?

MR. TOPKIS: Could the witness be shown the occasion on which it is suggested?

THE COURT: He can say "I don't remember" perhaps, and then be shown.

Are we going to be right back at this exhibit?

MR. HRUSKA: Yes, we are, your Honor.

MR. TOPKIS: I thought that was the fact.

THE COURT: This, it seems to me, is a futility on this particular point.

Go ahead and answer. Is that the position you have taken, Mr. Finkelstein?

Do you want the question read back?

THE WITNESS: I'd better get the question.

THE COURT: Would you please read back the question?

(Record read.)

A Well, I happen to know now the occasion that you refer to. What I was saying at that time, a position taken by NBC was specious and I gave my reasons.

THE COURT: What do you mean by the phrase that it was inconsistent with experience, too?

MR. HRUSKA: Contrary to experience.

THE COURT: What did that mean?

THE WITNESS: I was saying, in fact, NBC -- if you look at Paragraph 9, I said, "Moreover, NBC is seeking the aid of this Court in furtherance of that attempted use of its power to drive down the price paid for individual compositions."

Then I picked their position apart and I say that, now they are really not saying that -- their position isn't that ASCAP isn't necessary to them. They want to use all the benefits as I think CBS does right now in this case, wants to use all the benefits that ASCAP can confer, but not be subject to any of the correlative responsibilities that go with accepting those benefits NBC was seeking, was taking the position just in order to drive down the price that they would pay if they were dealing with individuals, and they could do that because of their power. They would not have to worry about beint charged with violating the anti-trust law because they would have a [illegible] of the Court protecting them. If you read this affidavit, you will find that that's what is said there.

Q That was the basis for your judgment that experience indicated that ASCAP was necessary for television networks?

MR. TOPKIS: There's no such statement here.

THE COURT: Sustained. You are not reading the affidavit. You are just giving your own construction of the affidavit.

The affidavit uses certain words. If you want to say that was the basis of your saying the following, I will allow that question.

Q What was the experience contrary to the NBC position that ASCAP was unnecessary to television networks?

A Well --

MR. TOPKIS: Excuse me, your Honor.

That is not a statement -- this is so silly. We are arguing about words in a paragraph three years ago in another country.

Your Honor, I object to this on the ground it's pointless haggling. I'm not sure that's an objection know to the rules of evidence, but I will press it.

THE COURT: I will sustain the objection on the grounds that the question has been asked and answered several times, it seems to me.

You can argue that Mr. Finkelstein's answer hasn't been satisfactory, but I think he's answered that question several times.

MR. HRUSKA: I really, with all respect, your Honor, don't think I can argue very much at all without getting this affidavit in evidence for the purpose of making the argument. I believe that the statements in this affidavit are crystal clear and --

THE COURT: And I disagree.

MR. HRUSKA: I understand that, but I don't see how I can ever make an argument of the nature your Honor just suggested without having some portion of this record to refer to the two sentences in the affidavit.

THE COURT: I don't see why you can't say, "Mr. Finkelstein, you said so and so in 1970. How do you reconcile that statement with what you said on the record five minutes ago."

MR. HRUSKA: All right.

Q Mr. Finkelstein, in 1970, you said that MDC's position that ASCAP is unnecessary was directly contrary to experience --

MR. TOPKIS: No.

THE COURT: Just read the sentence and then we will have the whole thing in there.

MR. HRUSKA: It is two sentences.

THE COURT: Two sentences.

Q In 1970, you wrote these two sentences in an

jbb-2 Finkelstein-cross

affidavit:

"NBC seeks to justify that use of its monopoly power to force down the price of music on the grounds that the service performed by ASCAP is unnecessary and involves unwarranted overhead and other costs. That statement is directly contrary not only to experience but to statements previously made in this court by the chairman of the board of directors and general counsel of Broadcast Music, Inc."

MR. HRUSKA: The rest of this is immaterial.

THE COURT: Yes.

The question is, Mr. Finkelstein, how do you reconcile those statements with your statement earlier this afternoon that you didn't know if ASCAP were necessary to a TV network.

MR. HRUSKA: Precisely.

A I was saying that the NBC position, the NBC statement of its position was just an excuse for exercising its monopoly power and I cited in support of that, based on experience, a statement by none other than a member of the firm representing CBS, president of BMI and the BMI was a corporation organized by the broadcasting industry and I thought that was sufficient to -- sufficient statement made under other circumstances --

THE COURT: Are you saying that the experience that was referred to in that sentence was the statement made by Mr. Kaye?

THE WITNESS: I cited that as supporting the experience, that the service that ASCAP performed for the network and that in my opinion, I think -- now, this is just a personal judgment -- I think this proceeding, for example, this is just my own thought and it may be irrelevant was brought for the purpose of driving down the price of a blanket license.

THE COURT: You mean this proceeding?

THE WITNESS: This very proceeding now.

That if I had said to CBS in answer to their letter of December 19, asking for this kind of license, if I had said, "Well, we will give you a blanket license for 50 per cent of the present money," they would have grabbed it and --

THE COURT: So, are you saying in effect that you believe that the remarks that were contained in your affidavit are equally applicable to your position here?

THE WITNESS: I do, your Honor.

Q Do you believe, Mr. Finkelstein, that experience demonstrates that ASCAP is necessary for the CBS television network?

A I just think that I have answered that question.

I think you can get along without ASCAP and I think that you would love to have all the convenience at less money.

THE COURT: We have never defined the word "necessary," Mr. Hruska. We will --

MR. HRUSKA: Let me pursue it this way, your Honor --

MR. TOPKIS: Other than pursue it, can we speak of it of whipping as in whipping a dead horse?

Q Is it true that large scale users of copyrighted musical works would find it wholly impractical to deal with individual copyright owners to fulfill their requirements for music performing rights.

MR. TOPKIS: Could we know from where Mr. Rhuska is reading.

THE WITNESS: That is Cascade.

Has the question been asked? I am ready for it.

THE COURT: The question is asked.

Do you want it read back?

THE WITNESS: Yes, please. I think I know what the question is.

Your question is, is it true that large scale

users have to resort to this kind of clearance in order to be able to do business? Large scale users of music.

MR. HRUSKA: May I repeat the question, your Honor, because I would like to get it exactly the way I asked it, rather than having Mr. Finkelstein rephrase it.

THE COURT: You may, but I must say, at this stage I don't know any substantial difference between what you read and what Mr. Finkelstein said.

Q Is it true that large scale users of copyrighted musical works would find it wholly impractical to deal with individual copyright owners to fulfill their requirements for music performing rights?

A I said that in the context of a case involving a Washington broadcaster, a single station, and I was talking about large scale users and I mean anybody that uses music on a large scale as opposed to somebody who uses occasional music and I think the very existence of ASCAP is for the purpose of satisfying the needs of those large-scale users who have to have access to such a large repertory that so far we haven't found a better way to meet that, in fairness to the suppliers and in fairness to the unions. In fairness to both groups, then the ASCAP thing offers as we have set it up in the 1950 amended judgment.

MR. HRUSKA: Your Honor --

Q I would like to read you a portion of your deposition given in this case at Page --

THE COURT: The case we are in now.

MR. HRUSKA: Yes, in this lawsuit.

Q Beginning at Page 46, Line 22:

Q Is it true that large scale users of copyrighted musical works would find it wholly impractical to deal with individual copyright owners to fulfill their requirements for music performing rights?

"A I believe they would.

"Q Is CTN a large scale user?

"A Oh,yes."

Mr. Finkelstein, was that testimony true when you gave it?

A That testimony was true when I gave it and it was supplemented later, if you wish me to tell you how, I will do that now.

Q I think I will leave that for your own counsel on redirect.

Do you believe, Mr. Finkelstein, that in the field of music performing rights the large scale user is obliged to deal with all the copyright owners for whose musical compositions there is a public demand?

A I believed that when I said it but going back to

1940-'41, and reviewing the situation that the Warner Bros. found themselves in, I would say that I should qualify that statement, that large scale users other than network broadcasters are in that position.

I would say the network broadcasters can create any world they want.

THE COURT: When you read from the deposition would you indicate the page you are referring to, not only for Mr. Topkis but when I am going over all of this up in my ivory tower, I may wish to look at the deposition myself.

MR. HRUSKA: Yes. The last portion from the deposition started at Page 206, and went to the following page.

THE COURT: Do you care, Mr. Finkelstein, to elaborate on why you think your opinion should be qualified to eliminate or put the networks in a separate category?

THE WITNESS: Yes, your Honor.

At the end of 1935, the ASCAP agreement with its members expired, it expires every ten years or whatever, for the whole membership. Any member can resign at the end of a whole year but -- it will expire in 1975.

THE COURT: You mean if I wait until then, I won't have to write an opinion?

THE WITNESS: And when that happened in the end of

1935, Warner Bros., complaining that ASCAP wasn't doing a job for them because they weren't licensing the networks, withdrew from ASCAP and the result was that Warner Bros. couldn't get one of their -- then they tried to license the networks independently and the result was that they couldn't get any of their works performed on the networks and their writers began saying that they wanted to withdraw their work from that Warner catalog, they wouldn't place works with Warner and after they had seven months of experiance being outside of ASCAP, they were forced back in, not by ASCAP but by the networks, because the networks wouldn't perform their works unless they were members of the Society.

Now,today, they wouldn't perform a composition unless the writer is, or publisher or copyright owner, whoever it is, is either a member of ASCAP or affiliated with BMI or SESAC or is in a position to give them an indemnification agreement that they can respect, bond or whatever they require.

So that when I think back about this experience that applies generally and I think of the networks separatel I have to say, well, the networks are in a different positio they can create any kind of a world they want; they have done it.

But when they created BMI, the networks put up the money for it and NBC supplied the financial officer and CBS supplied the legal officer and they put up each a million and a quarter dollars to start it going, so the networks, against the experience we have had, we know that the networks can create any world they want, provided they don't have to worry about offending the antitrust laws and if they have a decree of the Court that sanctions what they are doing, they are really in and the author is really out.

Q Now, the 1941 situation and the 1935 situation that you referred to were situations in which, I think, you had earlier told us, in your belief, the networks agreed among themselves to act in a certainway; in 1941 not to use ASCAP music.

I ask you to assume that NBC and ABC Television Networks retained their ASCAP licenses, whereas the CBS Television Network canceled its ASCAP license, do you think the CBS Television Network would, under those circumstances, be obliged to deal with all the copyright owners for whose musical compositions there was a public demand?

A Well, I can't assume that as a proper premise, because our agreements with CBS -- with NBC and ABC provide that if you get some special form of licensing in this

case, they are entitled to the same form of licensing and you can be sure that all three of you will be on the same basis. So that it won't be CBS against the other two, but it will be all three.

THE COURT: I don't think that answers the question. Mr. Hruska was assuming that CBS canceled its license; it had no relations with ASCAP and NBC and ABC did not do that and continued to go along on the present arrangements and the question was whether under the circumstances you believe that CBS would be obliged to deal with publishers whose music was in demand, public demand.

THE WITNESS: Well, I imagine that only CBS can tell you that. I am sure they have some plans about that eventuality.

Q Mr. Finkelstein, do you recall having written an article called Public Performance Rights in Music and Performance Rights Societies, in1952 for a publication entitled "Copyright Problems Analyzed," and perhaps if I show you the article, you would have a fresher recollection of it. This is PX15 for identification.

MR. TOPKIS: Is the question did Mr. Finkelstein write this document?

MR. RHUSKA: Yes. Well, whether he recalls writing it.

A As this indicates, it was a lecture I gave.

Q Right.

When you said in this article at page 83, "The fact is that in the field of performing rights the large user is obliged to deal with all the copyright owners for whose musical compositions there is a public demand", did you mean to exclude the CBS television network from that statement?

MR. TOPKIS: Objection, your Honor. Isn't this just pointless argument?

THE COURT: I will sustain the objection. I understand Mr. Finkelstein's testimony to have said at least up through the point at which he was deposed in this case, he generally stated his view along the lines indicated in this article and in his deposition, and that he now wishes to qualify that on reflection by having concluded that the networks have certain special characteristics which should be recognized as putting them in separate categories. I am just trying to wrap this up. Do I have you right?

THE WITNESS: That's correct.

THE COURT: He's been indicating that everything that went before did not have that qualification. There's no point of our arguing all day about this.

Q I hope this will clarify things. Am I correct in understanding, Mr. Finkelstein, that the bases for the

qualification consists of the 1941 experience and the 1935 experience that you have previously alluded to?

A Well--

Q Or the conclusions that you draw from those experiences?

A Until the NBC application and that kind of thing, I had no reason to separate out the networks from all other users. After all, if I were running a network, I would feel--if I were running a network, I would feel nothing that I had to operate in the public interest, convenience and necessity, that I had to have--if there was a means of my getting ready access to everything, I would feel that I had to take advantage of that as long as it was reasonable.

I don't think--I think that I have learned to--I have come to the conclusion that one or two or three of the networks, and I don't know how many it is, has come to the same kind of conclusion that was reached in 1941, '40, '41, that if the people who write and publish music are pushed around enough by the power that the networks have, the price will go down.

When I reflect on whether there's any real merit, whether I ought to be afraid of what may happen, I have to think in terms of, well, they are able to get along without all of us before, why can't they do it again. So

I come to the conclusion that you really don't need ASCAP or BMI or SESAC either for a temporary period or whatever it is. I'm pretty sure it would only be a temporary period. Until you could dictate the price for the product on the basis which says your convenience, which would be the blanket basis, you will try anything else and control your use of music and only you can do that, no other user can.

THE COURT: When you say you, do you mean CBS in particular?

THE WITNESS: I mean the three networks. CBS, NBC number 1, NBC number 2 and ABC in that order.

Q Is it your belief CBS can do that if NBC and ABC are not doing that, but operating under the ASCAP blanket license?

A I'm sure that the other two if they think you are saving money by what you do will join you and they have the right to do that. Perhaps I am not responsive.

Q I don't think you are, Mr. Finkelstein. I would like you to answer whether in your judgment, Mr. Finkelstein, CBS can limit its use in the way you described in your next to last answer if NBC and ABC were operating under an ASCAP blanket license?

A Well, they could do it all right. For instance, CBS decided on radio that they would go all talk. The other networks by and large have continued their music policy.

CBS is getting along perfectly well all talk.

Q You think a television network could go all talk and get along perfectly well?

A I said in radio you decided you would get along the necessity for an ASCAP blanket license of the kind you would have been having at least and you would be successful in doing it.

Now, in television, I don't know how you might want to change your programming. I don't know whether you need the concurrence of the other two networks or not to do it. I know this, that if in this proceeding you were to get what you seek, the other two networks would have the same thing. That is something that I have to think about.

Q NBC has already told you that they would take a--

THE COURT: I think what Mr. Finkelstein means is that he assumes that the outcome of this case would generally be applicable and available to other networks.

A We have agreed on that, your Honor, with the other networks.

THE COURT: And if the choice is available and desirable to you, it presumably in his mind would be available and desirable to them, is that right?

THE WITNESS: Yes, your Honor.

Q In fact, NBC has stated to you that they would

take such a license, haven't they?

A I didn't say that, Mr. Hruska.

Q I believe you said it before, sir.

A I think the record will speak for itself.

Q Let's turn to it.

THE COURT: Does it really make any difference?

MR. HRUSKA: It happens to be the one part of my notes, your Honor, where I didn't put the page reference down

THE COURT: I don't care whether Mr. Finkelstein said NBC told them that or he didn't tell them that. It is a reasonable thing for one to assume. I understand you to say that there's been some agreement to that effect.

THE WITNESS: Yes, your Honor. They have insisted on it.

Q Do you believe that anyone furnishing music to the public must not only be able to furnish whatever the public demands but also be able to do that without having to conduct extended negotiations to obtain licenses?

A If you change that must to should, I would say that that would be applicable today. I may have said at one time that everybody must. I would have to qualify that today by the same qualification that I made about the three networks. The obligation--I think the obligation is there on the part of all users, particular broadcasters, to see that the public

gets what it wants and on the part of the suppliers of music, notwithstanding their exclusive rights and their copyrights. I think ASCAP, for example, oes the public an obligation to see that it doesn't put any unreasonable roadblocks in the way of all the music that any user might want or that the public demands being available to the public. I think the 1940-41 situation if it can be ever avoided again, ought to be. I think that's why we agreed to the 1950 arrangement where the Court can fix the price.

Q Mr. Finkelstein, I would like you to assume that ASCAP was split into three groups.

Irving Berlin, Rodgers and Hammerstein and Cole Porter music in one group, the estates of Jerome Kern, Sigmund Rothberg, Victor Herbert and other estates in a second group and all other popular writers in a third group.

Would any large scale user have to secure licenses from all three groups in order to satisfy the public demand?

MR. TOPKIS: Objection, your Honor. If there were a public demand for those three groups--what is the Latin term I want--ipso facto, he would have to get a license from all three groups in order to satisfy the public damand.

If I want to climb a 12-foot wall, I better have a 12-foot ladder.

THE COURT: May I hear the question?

(Question read.)

THE COURT: Objection sustained. Would this be a good time to take an afternoon break?

MR. HRUSKA: Certainly, your Honor.

(Recess.)

BY MR. HRUSKA:

Q Mr. Finkelstein, I would like to read to you a very few passages from your deposition given in this case starting at page 184, line 24.

A I wonder if I could--

Q Do you want to follow it as I read it?

A I would. It would save time.

Q It is not that long.

THE COURT: I think it is a good idea.

(Pause.)

Q "Question. Is it true that the need for bulk licensing of Performing rights is nowhere more evident than in the radio and television field where program directors require the greatest latitude in building their shows while protecting the stations it sponsors and the artists from claims of infringement?"

Then there was some colloquy and other statements.

At page 187, line 21, an answer was given, which says "I would say that that is a correct statement in that context.

"Question. Is it true that restrictions on such latitude of program directors would impaire the quality of their programs?

"Answer. Oh, I think it would.

"Question. Is it also true that the failure of the television network to obtain an ASCAP license would constitute a restriction that would impair the quality of its programs?

"Answer. Yes, and I would say that today the

same thing would apply to the BMI license.

"Question. Is it true that the impairment of the quality of a television network's program will adversely effect the network's competitive position vis-a-vis other networks?"

And after some colloquy and the re-reading of the question, the answer is given, "Answer. Well, I suppose if the quality of a network's program is impaired, that it isn't going to be in as good a competitive condition with other networks as if its quality is not impaired as related to the other network.

That is, if the other networks' programs don't suffer the same impairement, then it would follow that what you say is correct."

Was that testimony true at the time you gave it, Mr. Finkelstein?

A If you take it--you skipped part of it. If you take what I'm saying there, take the statements in their context, it is true.

Q Thank you.

Do you believe, Mr. Finkelstein, that commercial users need ready access to practically all copyrighted music demanded by the public?

A I think they should have it.

Q Do they need it?

MR. TOPKIS: Haven't we been over and over this, your Honor? I had the impression that Mr. Finkelstein has repeatedly testified that the 1940, '41 experience demonstrates that CBS and the other networks could get along without it and so on. We spent a whole afternoon on it.

THE COURT: I do think that the subject is important.

On the other hand, I feel reasonably satisfied that I understand Mr. Finkelstein's views on this situation. I don't think that they are at odds with the point that Mr. Hruska is trying to make. So I think more of this line would be cumulative, Mr. Hruska.

Let me see if I do understand this. If this is the sum and substance of Mr. Finkelstein's views as I now understand them, namely, the right of ready access music is first of all something which is desirable from the public's point of view, that is that the networks or any large user should have that access; secondly, that ASCAP and BMI perform the function of making it readily accessible to them--I don't use the word accessible in any particular esoteric sense--

MR. HRUSKA: Word of art, yes.

THE COURT: --third, that it would be impracticable for most large users to try and handle the clearing of music

on their own; four, that on reflection and qualifying his previously expressed views, Mr. Finkelstein believes that the networks have a specially advantageous position because of their economic power and the fact that there are a limited number of outlets for the use of music as themselves and that they can, if they are determined to, create conditions by which they can use music in the quantity they wish to without the licensing organizations sooner or later anyway;

Finally, that he can conceive of a situation, and I'm not sponsoring the statement by repeating it, or opposing it either, in which even if CBS was the only network which did not have a license, it could survive even if its competitors did have blanket licenses.

Have I correctly stated your views and if not would you please indicate in what respect I have not?

THE WITNESS: Your Honor has correctly stated my views.

BY MR. HRUSKA:

Q At page 113 of your deposition in this case, Mr. Finkelstein, in the context of an assumption that CTN did not have an ASCAP license, the question was asked, line 19:

"Question. And in order to fulfill its requirements CTB or the producers of its programs would have to deal with writers and publishers?

"Answer. In my opinion, yes."

A I don't have that before me, Mr. Hruska. I couldn't answer that question without having the full context before me.

Q Do you have the deposition--

A I don't have page 113.

Q You don't. I'm sorry. I assumed you had.

MR. TOPKIS: I don't understand this, your Honor.

MR. HRUSKA: I haven't asked the question yet, your Honor.

THE COURT: What is it you don't understand?

MR. TOPKIS: I don't understand the procedure that is being employed. Is this being put to him as inconsistent with something he said?

THE COURT: Until I hear the question I can't rule.

What is your proposed question?

MR. HRUSKA: My proposed question is whether that is a true statement, and, your Honor, the only reason I am doing this is because I am operating under the assumption that matters of considerable substance in Mr. Finkelstein's deposition and in Mr. Finkelstein's prior writings and testimony, matters in our view, should be brought before your Honor in this fashion.

THE COURT: All that I have said is that anything of substance should be brought before me by examining the witness rather than just by putting something into evidence now or at the end of the trial.

That doesn't dispense with the need for my determining whether when you do put something before me it is admissible or it isn't admissible.

MR. HRUSKA: Of course.

THE COURT: The objection has been made in effect that the question you have asked is the witness about something which is not inconsistent with his prior testimony, and, therefore, is inadmissible on cross examination. I am inclined to think so.

I don't think that Mr. Finkelstein has denied that if CTN didn't have a license and it wanted music, it would have to deal directly with the composers and publishers, am I correct?

THE WITNESS: That's correct, your Honor.

THE COURT: In fact, I can't conceive any other way they can get the music, unless they hired the composers and had it written.

MR. HEUSKA: Well, there is a difference, your Honor, between dealing simply with publishers and dealing with publishers and writers and that --

THE COURT: Does your view include the necessity of dealing both directly with publishers and writers?

A Oh, it would all depend on the contract between the writer and the publisher.

THE COURT: I should think so.

A The relationship between the writer and the publisher, too.

THE COURT: They would have to do whatever they need to do to cover themselves.

A That's correct.

THE COURT: Or, as you pointed out earlier, they could take their chances and infringe.

A Yes, they could or they can say they will deal only with the publisher because under the copyright law, the publisher, if he is the copyright owner, has the presumed authority to do certain things unless they are put on notice to the contrary.

I don't know to what extent they would be put on

notice to the contrary.

Q In performance rights, Mr. Finkelstein, don't writers in your experience insist that they are equal owners and are quite jealous of their rights to insist that publishers not issue licenses without their approval?

A ASCAP almost fell apart on this issue at one time, when the 1935 agreements expired. The writers wanted a preamble in the agreement between ASCAP and all its members, writers and publishers, preamble saying whereas the writers and publishers are coowners of the right of performance, and the publishers refused to concede to that preamble.

Ultimately, it was decided that there would be no preamble. That's still at issue.

If you talk to most writers who are in the know or whatever, they will insist on their being coowners of the performance right and of the right of administration of that right and those same writers will probably say "but my publisher, I can trust him and I am willing to let him act for me," so that -- I don't know.

I know that on the 3% thing, one publisher asked me what my opinion was if dealing independently with Society and I said "I think to be on the safe side, you ought to go to your writers". He went to his writers and he got their consent without any problem.

But I could not tell him the law is this way or that way.

MR. HRUSKA: I move to strike those last two sentences, your Honor. I don't think they were called for by the question and I think they are hearsay.

THE COURT: I think you deserve a ruling in your favor and I rule in your favor.

Q If there were no licensing organizations, Mr. Finkelstein, is it true that most writers and publishers would not be able to make themselves available to producers of television programs?

MR. TOPKIS: Could we have that question framed in the affirmative, instead of --

THE COURT: Let me hear the question, please.

(Record read.)

THE COURT: Can you answer the question, Mr. Finkelstein?

A Well, I wonder if I can have the context in which that statement was made?

MR. TOPKIS: Who would ever suspect that it was a statement.

A I have made statements like that and I can conceive of my making it.

THE COURT: Well, is this, again, a question in

relation to Mr. Finkelstein's deposition?

MR. HRUSKA: Yes, your Honor. There was a statement of this nature in the deposition.

THE COURT: Well, I think that if you can answer the question put now, Mr. Finkelstein, I would like you to answer the question put now.

If Mr. Hurska believes your present answer is inconsistent with your prior answer, you certainly can look at your prior answer and see what you think you meant by it but, do you understand the question?

A I was going to ask the stenographer to repeat the question.

THE COURT: Would you please repeat it?

(Record read.)

A Yes, I think considering that works are being used that are written and published all over the world -- numerically, certainly, that is true -- that they wouldn't be able to make themselves available.

THE COURT: May I ask what you consider the definition of making yourself available in that context?

A Yes. If a writer or a publisher wants to -- well, if a producer wants to negotiate for a given use, if you are going to do it on an individual use basis, it wouldn't be practical for the producer to, if he had some other method

available to him, to try to get in touch with each writer or publisher of the work that he was going to use.

The chances are that in that kind of world, he would deal basically with the publishers that it was easy to deal with and, so, those that were on the fringe would be out in the cold.

THE COURT: Right.

Q To accomplish the direct licensing of performance rights, would producers have to engage in innumerable and complex individual negotiations with the thousands of ASCAP members?

MR. TOPKIS: Producers of what?

MR. HRUSKA: Television programs.

A Yes. I think so. I think that if the producer were clearing performance rights, does he clear them for the television network or does he clear them for syndication? Does he clear them worldwide or just for the United States?

Who is going to participate in the show, what kind of show it is going to be.

Will the payment be based on what the advertiser pays the broadcaster or will the payment be made on the basis of payments that are made then you buy an exclusive right to something because wuld these rights still be non-exclusive or would they be exclusive?

These are all things that you don't have to face up to in the performing rights world as we know it. They are things that you would have to face up to in the kind of world that you envisage.

Considering the widespread uses of music, I would say that the answer is in the affirmative, if I recall the question.

Q Are you aware, Mr. Finkelstein, that there are facilities for direct licensing in television synchronization rights?

A Oh, yes, but don't you know that a television synchronization right is very often just given away? It is given away because the grantor of the right knows that he is going to get performing rights and unless he gives that synchronization right, very often gives it away or at a very low price, his work is not going to be used and he can't earn his performance rights.

So that the -- there are a lot of publishers -- now, I don't know just what the business is right now, because I haven't looked at it for a year or two, that end of the thing, but a lot of publishers were trying to get their fellow publishers to give away synchronization rights and rely entirely on performing rights.

Some of them did and, you know, they didn't want to

be charged with running out and doing unfair things and all that but I don't know -- I mean, you had all kinds and shapes and variations.

Some publishers, you know, wanted a separate synchronization fee every time a work is used for, you know, when it goes on television, one fee when it goes on the first time and another fee for the second time and another when it gets into syndication and other publishers say, "look, this whole licensing of music rights is keyed to simplicity and don't get it complicated; do it in as simple a way as possible," and those publishers who subscribe to that I think get very little on synchronization fees.

So that what you do there, you don't have the problems at all that he had in performing rights. Performing rights, the value of a use for perfor mance purposes, what is the performance, but the value of a use for synchronization is merely, you know, what's the right to record? One recording; what's it worth? It's quite a different thing.

That may have no relation to what the thing brings in when it's performed. It ordinarily will have that -- will have no relation to it.

Q Is it true that absent direct licensing facilities the producers of television network programs could not hope to communicate with all the copyright proprietors whose music

they desire to use?

A I think that is --

MR. TOPKIS: If I may interrupt for just a second --

MR. HRUSKA: Your Honor, there was an answer.

THE COURT: Don't interrupt; just make an objection.

MR. TOPKIS: That's what I tried to do but I was beaten to the punch.

That seems to me a selfevident proposition. Since it is argumentative, if anything --

THE COURT: I will sustain the objection on the grounds it seems to me that you have been over this and that Mr. Finkelstein, if acknowledges is the right word, acknowledges that there will be substantialproblems for a user of music, a large scale user of music, if there were no ASCAP or no ASCAP licenses, including the difficulty of the publishers and the writers making themselves available and the opposite of that seems to me to be the difficulty of the producer getting in touch with the publishers and the writers.

MR. TOPKIS: I don't understand this making themselves available. The telephone exists; what is this --

THE COURT: You are not objecting, now.

Mr. Finkelstein used that phrase himself and ratified the use of the phrase in the deposition a short while ago and I asked him what he meant by making themselves

available and he explained it.

That is in the record.

MR. TOPKIS: I apologize, your Honor.

Q If you were running CTN, you wouldn't want to dream of the situation in which the producers of your programs had to be negotiating with individual copyright owners, would you?

A Oh, I would be very happy to take advantage of what ASCAP offers and, as I think CBS feels, as long as the price is right -- that's the most comfortable world for them to live in.

Q But you, in these circumstances, would not dream --

THE COURT: He answered the question, Mr. Hruska. What's the difference whether he would dream about it or not? He believe, that he made is clear, that CBS--first of all, for Mr. Finkelstein to put himself in the place of the chairman of CBS doesn't seem to me to have very much probative value. Secondly, he has indicated in the past that he believes that if he were the president of CBS he, like he believes you, would use ASCAP when it was convenient and cheap and would try to do something else if he didn't use it or if he didn't conclude that it was.

Q Now you recall, Mr. Finkelstein, the NBC applicati for a nucleus license in 1970. I believe you already have

testified that you did.

A Yes.

Q Do you recall that that, the license that NBC sought in that proceeding, was for 2217 named compositions in the ASCAP repertory plus background music libraries.

Do you recall that?

A Yes, I do.

Q And do you recall that NBC in that proceeding had stated a plan under which they contemplated directly licensing compositions not on that list or, if they failed to do that, making further applications to ASCAP for the right to use those unlicensed compositions?

A Well, I don't recall at this time pre-isely what the application was but it was along the lines that you suggest.

Q Right. Now, do you recall pointing out to the Court in that proceeding that such a procedure would impose an impractical burden of continuous applications on both the Court and on ASCAP?

MR. TOPKIS: Objection, your Honor. I see no relevance in this, whether Mr. Finkelstein did or did not point out something to the Court in another proceeding.

THE COURT: What is the relevance?

MR. HRUSKA: The relevance of it, your Honor, is that if ASCAP made the arguient in the NBC proceeding that th

NBC plan of a ttempting to directly license musical compositions not on the list of 2217 songs would create this burden of continuous applications, ASCAP was saying to the Court that it did not believe NBC could successfully directly license those compositions.

I believe that that is a highly significant admission in this case. It is contained in an affidavit by Mr. Finkelstein and I would like to both examine Mr. Finkelstein about it and offer that affidavit in evidence.

THE COURT: I don't know whether I consider it to be as significant as you do but I think it is relevant and I will hear it.

MR. TOPKIS: Could I know where in the affidavit?

THE COURT: Would you refer to the portion of the affidavit?

MR. HRUSKA: It's PX 12, your Honor, in paragraph 12 on page 7.

There is a pending question.

A I am waiting for Mr. Topkis to --

THE COURT: Do you know the answer to it? If so, you can answer it. The question is, do you remember pointing that out to the Court.

A I do and it seems to me that it is self-evident.

Tk 7

Q You believe that the NBC nucleus license approach was unworkable, is that true?

MR. TOPKIS: Objection, your Honor. Certainly we don't have to litigate the workability or unworkability of the NBC nuclear license approach. We have enough problems here.

MR. HRUSKA: What I am getting at, your Honor, is that I want to bring out fully the reasons ASCAP stated in that proceeding that NBC could not directly license its requirements. Those reasons I believe, your Honor, are highly pertinent to this case because they would apply equally to CBS in the event of a bypass.

MR. TOPKIS: If your Honor please --

THE COURT: Mr. Topkis, I think if the reasons were applicable to this situation, then the testimony would be relevant. I can't judge that without hearing what the reasons are. I think it is quicker for me to hear what reasons are and get it overwith, and you can argue about their irrelevance.

MR. TOPKIS: Your Honor, Dr.Stanton and Mr. Sipes, the two people at CBS who presumably know something about this, both testified before this Court that the only bar to direct licensing that they can envisage would be the disinclination on the part of ASCAP members to deal

with CBS and its producers. That being so, M fail to perceive the entire pertinence of this entire line of questioning unless Mr. Hruska is saying that Dr. STanton and Mr. Sipes don't know what they are talking about. I would think that the issue we would be litigating here would be inclination or disinclination. That is why I felt we heard all that business about 3M and so on.

MR. HRUSKA: Your Honor, with all due respect to Mr. Topkis, that is not I believe an accurate description of either Dr. STanton's testimony or Mr. Sipes' testimony. It also has nothing to do with this question, what Mr. Sipes or Dr.STanton testified to. If the reasons that ASCAP pointed out to this Court in this NBC proceeding are equally applicable to CBS, then, your Honor, I believe we are entitled to bring this out through Mr. Finkelstein. I think if this is not brought out, that a very important area of proof will have been excluded.

THE COURT: I am not quite sure how this all fits together. Supposing you show that Mr. Finkelstein specified certain impracticalities and objections to the NBC arrangements, supposing you show ---

MR. HRUSKA: NBC directly licensing songs not on the nucleus list.

THE COURT: And supposing you show that those

reasons if they were true about NBC would be just as true about CBS, how does that help me decide whether or not there is a violation of the antitrust laws here, that is whether ASCAP has control of the situation, a monopoly or unreasonable restraint of trade? And it certainly doesn't have anything to do with the feasibility of your plan.

MR. BRUSKA: No.

THE COURT: What do you claim it does relate to?

MR. BRUSKA: If ASCAP has admitted, and obviously we believe that they have, then it would be completely unworkable for NBC to attempt to directly license its requirements for music, that is music not on the NBC nucleus list, and that seems to me, your Honor, to be another very powerful reason why the ASCAP contention that CBS could successfully bypass ASCAP is unfounded. It is true that there is a great deal of evidence in this case, including a stipulation. We went through all that the opening day of trial, your Honor. I understand that. This is --

THE COURT: You are offering this with regard to the bypass?

MR. BRUSKA: Certainly, your Honor.

THE COURT: Certainly in your mind, but it wasn't certain in my mind until you made the explanation.

I will receive it with regard to the bypass

question for whatever illumination it may provide.

Now we have to go back to whatever you were asking.

MR. HRUSKA: I think I can rephrase it to save time, your Honor.

BY MR. HRUSKA:

Q You believed, Mr. Finkelstein, that the NBC nucleus license approach was unworkable, true?

A Not true as youstate it and not a complete quotation of what you read before.

Q I did not imply that it was a quotation. I just want to know whether that is your state of mine, did you think that that application or that approach was workable or did you think it was unworkable?

A It all depends on what you mean by unworkable, from whose point of view. What I said -- you read something and I thought it was self-evident.

THE COURT: It was Paragraph 12.

THE WITNESS: I don't have it before me, your Honor. I don't think I need it. We are talking there about NBC having to make an application to the Court each time it wanted to get a reasonable price fix for each year's u of a composition not included among the 2200 or 2700, whatever it was. I said that would impose a great burden

on the Court and I didn't think that would be workable. I don't think now that would be workable, as I don't think that it would be -- that I could fancy any plan in this case under what you call a per use thing where if issues came up about not how much CBS pays for the whole repertoire, and that is the issue that now comes up in the rate proceedings before Judge Ryan -- but the Court had to decide whether for each composition and each use of that composition the price quoted was reasonable, and you had to constantly do that as prices changed or whatever. I think you would be -- I personally think you would be imposing on the Court an unreasonable burden quite apart from anything else.

I am now talking about what we were talking about there.

Q Do you believe, Mr. Finkelstein, that if NBC had obtained such a license they would then be in a position of compelling such stars as Dean Martin and Herb Albert and Any Williams to limit their performances to songs on NBC's list?

MR. TOPKIS: Objection, your Honor.

THE COURT: Sustained. We have had enough hypothesis. If you want to ask Mr. Finkelstein what he thinks about the possibility in this case, that is one thing. An hypothesis about if NBC had received the

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license which they didn't receive, I don't think you are going to eliminate much on that. I will hear any questions you want to ask Mr. Finkelstein.

Mr. Finkelstein, was it implied in your belief that a substantial burden would be imposed on the Court that NBC would on many occasions be unable to bring about a direct license of the songs not included in the 2217?

THE WITNESS: I had in mind that the Court would just reject -- that the antitrust laws weren't designed to impose that kind of burden on the Court and it just wouldn't work.

THE COURT: However many there were?

THE WITNESS: However many there were and there would have to be many because I think that I could envisage-- I think I am in a position to project the number of occasions based on past, based on problems that I am aware of. I think I could anticipate that there would be far more applications than the --if this was -- if you are going to try to make it work, than the Court could possibly be confronted with considering the limited time with cases of this kind.

Q I thought we had an extra copy of this, Mr. Finkelstein, but we do not. I will have to read this to you.

MR. TOPKIS: Do you know what you are reading from?

MR. BRUSKA: Yes, I am reading from PX518, which is an ASCAP brief submitted in this case on March 24, 1972 (handing).

Q There is a footnote on Page 5 which reads, "CBS's answer to what it calls the spectre of the price-fixing mechanism is the suggestion that this Court's amended final judgment and ASCAP's membership agreements be amended to permit a member to withdraw authorization from ASCAP to license his composition on a per use basis, but presumably many if not all ASCAP members are happy with the present system and they would individually withdraw their authorizations. What then would be the point of a per use license.

My question to you, Mr. Finkelstein, is, why would the members' happiness with the present system lead ASCAP members to withdraw ASCAP's authorizations to license CBS under a per use system?

THE COURT: First let's find out, Mr. Finkelstein, did you have anything to do with the writing of this paper? I know your name may be on it.

THE WITNESS: I think I approved all briefs before they went in. I am just looking for the date. March

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UNITED STATES COURTHOUSE

24, '72. I probably -- I probably did, your Honor. I don't recall this specifically.

THE COURT: Then can you answer the question?

THE WITNESS: Now, the paragraph to which this is a footnote says, "We will show that CBS has abused and is likely to continue to abuse its economic power as a substantial buyer of program material including music and that a per use license scheme would be the very instrument of further abuse; thus, we will show as we previously have suggested a per use license from ASCAP would be used by CBS merely as a ceiling price by means of which it could force a writer or publisher to offer a lower price for an individual composition on a threat of refusing to play that composition.

In other words, the per use scheme would be merely a maximum price fixing mechanism. Then there is this footnote, "CBS's answer to what it calls the spectre" --

Q This is what I just read, Mr. Finkelstein -- "of the price-fixing mechanism is the suggestion that this Court's amended final judgment and ASCAP's membership's agreements be amended to permit a member to withdraw authorization from ASCAP to license his composition on a per use basis, but presumably many, if not all, ASCAP members are happy with the present system and they would individually

withdraw their authorizations. What then would be the point of a per use license?"

That is this. I am a member of ASCAP, let's assume. Let me speak as a member of ASCAP. If I remain a member of ASCAP, I must submit to a ceiling price for my compositions. I have to quote -- my organization quotes a price for the use of my works. I am not party to that. Then CBS with all its power can come around to me and say, if you will give it to us for half off the ASCAP price, we will play it. Otherwise, we will just mark that one off. And I know if I offend CBS, I am -- I am offending an outfit that controls my access to 200 stations in prime time. That is my main market.

If I have to do that, if I have to operate under that kind of system , then my ASCAP membership becomes not something I have been happy with but something that is a liability because ASCAP quotes a ceiling price for me. I negotiate against that, andif I am Irving Berlin or Richard Rogers or Burt Bachrach, and I think my material is worth far more than the average price fixed by ASCAP for distribution purposes, and presumably now for sales purposes, that is the ceiling. If I don't -- if I say I won't go below that, they can always use my work for that low ceiling. I can negotiate down from there. I would say that ASCAP

is now a disservice to me and I will get out of the organization. I think any --

THE COURT: I understand from your answer you believe that most members of ASCAP might withdraw. I don't understand, and I perhaps it is just a use of language the connection between the phrase "Most ASCAP members are presumably happy with the present system and therefore would withdraw."

THE WITNESS: That may have been an unhappy phrase. There it is in the brief.

THE COURT: On the other hand, I don't think there is any value of dwelling on it, Mr. Hruska.

MR. HRUSKA: I don't believe that the question was answered, your Honor. I would like to press for at least a short as possible answer to the question which was why would their unhappiness with the present system leave them to withdraw.

THE WITNESS: I thought that is exactly what I explained.

THE COURT: I think either Mr. Finkelstein explained it as well as he can or there is no explanation. Maybe an illogical statement. I can't remember whether I reacted to it as being illogical when I read it. I may have.

MR. HRUSKA: No, your Honor. That is not my point at all. My point is there is a logical connection and it is precisely that connection which I would like to bring out, if I can.

THE COURT: Then ask more questions.

Q Did it occur to you, Mr. Finkelstein, that massive withdrawals of music from the ASCAP reservoir, per use reservoir, might possibly lead to the end of the per use system?

A Oh, I don't know. I would have -- you know, I would have -- I would have to face the problem of -- with massive withdrawals we might have to get the consent of the Court to do it, you know.

THE COURT: I don't see this is getting us anywhere, Mr. Hruska. I am not going to decide this case on the basis of whether Mr. Finkelstein or Mr. Tophis or somebody else made some admissions during the course of the proceedings which may be inconsistent with what they are saying at the moment, at least when it is an occasional admission.

There are much larger factors here it seems to me which I am going to have to decide. I must say that I don't feel I am getting anything at all from the present question.

What difference does it make if Mr. Finkelstein or Mr. Topkis at the time they wrote that brief thought there might be massive withdrawals?

The question is whether there will be massive withdrawals. You are free to argue that.

MR. HRUSKA: I understand that, your Honor. The point of this, of all of this, really, is to attempt to demonstrate that statements -- and this particular statement perhaps is not the best exemplar of the point -- but that statements have been made through the years, time and time again, by Mr. Finkelstein, by other representatives of ASCAP, by members of ASCAP, all indicating that in their judgment an attempt by any large-scale user such as CTN to attempt to do without ASCAP licenses was just totally impractical, would injure that user.

THE COURT: I understand that thoroughly. I don't see how it can be denied that ASCAP has made such statements in the past, whether in good faith or not.

I must also, as a Judge, try to put them in context, realize what the motivation was for making them which can derogate from their dependability. I have to put the statements in context with what Mr. Finkelstein has said is the quandification which he now believes would add to all that, but I am perfectly prepared to state now unless I get cries of horror from ASCAP, and I don't think I will, that I understand they have strongly taken the position up until the very recent past, perhaps, that what you are posing is impractical and unworkable and that the world couldn't get along without them and BMI.

Or maybe it could get along without BMI.

MR. HRUSKA: CTN could, your Honor.

THE COURT: Then I have to decide whether I agree with them but I certainly understand that they have taken that position and I don't think you need to gild the lily on that point.

MR. HRUSKA: I am about to turn to another subject, your Honor. It would probably consume more than five minutes, maybe ten or fifteen minutes.

Would your Honor like to continue?

THE COURT: Were you going to raise your hand?

THE WITNESS: Your Honor, I have to talk before the Prag Law Institute in San Francisco and leave on Wednesday and if I could be sure that I could finish up tomorrow --

THE COURT: You have to leave when?

THE WITNESS: Wednesday morning, and I think 11:45 is my plane.

MR. HRUSKA: I think that is fairly safe.

THE COURT: Do you think it's safe?

MR. HRUSKA: I think so.

THE COURT: I would hope so but I would hope that you would be finished with the cross-examination in plenty of time to permit any redirect, to get Mr. Finkelstein off the

stand tomorrow.

In the normal court day?

MR. HRUSKA: Yes, your Honor.

THE COURT: I'll be prepared to stay late or if you want to start early tomorrow morning, I could. I don't like it because it means that I have very little time in chambers to do what I need to do.

MR. HRUSKA: I don't think there will be any need for it.

THE COURT: I will hold you to that, Mr. Hruska, and if it's necessary to telescope the cross-examination somewhat, I may do that, if you run over, seriously run over the estimate.

But on your assurance that you don't think you will, we'll quit now and start at 10:00 o'clock in the morning and we'll get you out of here by the end of tomorrow somehow.

(Adjournment taken to December 4, 1973 at 10:00 o'clock a. m.)

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PAGE	LINE	ERROR	CHANGE TO
3578	6	Berkin	Burkan
3578	10	aluminus	alumnus
3578	10	?	?
3578	16	Berkin?	Burkan?
3578	22	,is..., sir	, is..., sir
3578	25	SESAC?	CISAC?
3579	4	or ganization	organization
3579	6	Associates	Societies
3579	9	Associate	Society
3579	11	SCIBES	SCRIBES
3579	23, 24	Brittanica/Encyclopedia	Encyclopaedia/Britannica
3580	7	cases	classes
3580	8	Soya	Soia
3580	9	copyright	copyright;
3580	18	universal copyright convention,	Universal Copyright Convention,
3580	23	in1971	in 1971
3581	11	farthern	farther
3581	18	bythe	by the
3581	18	I saw	I say
3582	3	inthat	in that
3582	18	Nyland	Arnold

PAGE	LINE	ERROR	CHANGE TO
3582	23	inMilwaukee	in Milwaukee
3583	22	theSociety	the Society
3583	22	mek	make
3584	14	even	us
3584	19	Broadcasters	broadcasters
3584	25	Q Were they,etc.	DELETE ENTIRE LINE
3585	8	Broadcasting	broadcasting
3585	21	next in the period	text in the decree
3586	10	rebeled	rebelled
3586	16	ow,	Now,
3586	20	discussions responded	discussions or responded
3586	21, 23, 25	mutual	Mutua
3588	5	few	new
3588	16	too	took
3589	3	cettain	certain
3589	13	respectives	representatives
3589	13	Kaluber	Klauber
3589	20	activate	activated
3590	18	corrollary	corollary
3591	2	recall	consider
3591	4	Palley	Paley
3591	5	that Mr.	that when Mr.

PAGE	LINE	ERROR	CHANGE TO
3592	13	whther	whether
3592	17	Libel	Leibell
3593	9	for full	for the full
3594	15	Tim Berk's	Timberg's
3595	5	decree for	decree that for
3595	11	assigned	signed
3595	17	licenses	licenses,
3595	18	reveals	reveals,
3596	5	unrealted	unrelated
3596	6	concerted	concert
3596	14	sought	sort
3597	2	right as the	right, as to the
3597	3	Society user	Society's users
3599	8, 15	universal copyright convention	Universal Copyright Convention
3599	9	convention	Convention
3599	16	fordealing	for dealing
3600	3	of formula	of the formula
3600	4	sumphony	symphony
3600	23	licensed	license
3601	12	or	nor
3601	22	question done	question of what is done
3601	23	am sure	am not sure

PAGE	LINE	ERROR	CHANGE TO
3601	23	opinion would	opinion, which would
3602	14	imperial	empirical
3602	19	of blanket	of the blanket
3603	13	merrily	merely
3604	22	-t	at
3608	7	he said he even s-id	he said they even said
3608	8	relevanceof	relevance of
3609	15	dirbctly	directly
3610	8	Yes. Please,	Yes, please.
3610	18	relatingat	relating at
3611	22	theuse,	the use,
3612	3	difference	different
3612	7	setby	set by
3613	21	use	uses
3614	10	nn	on
3615	3	meens	means
3615	4	copy	copyright
3615	9	licensing	listening
3616	6	Lennie	Lenny
3616	11	parodys	parodies
3616	13	Mario,	Mario",
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PAGE	LINE	ERROR	CHANGE TO
3617	12	the accuracy of	DELETE PHRASE REPETITIOUS
3617	14	end up..	end up.
3618	9	for	or
3618	10	mustic	music
3621	9	negotiations,	negotiations
3621	10	writhdrawn	withdrawn
3621	10	has withdrawn	has not withdrawn
3623	23	complies	contemplates
3624	8	deposit	posit
3625	12	invisage	envisage
3627	2	of	or
3627	4	anylimitations	any limitations
3627	19	have	to have
3628	2	boycot	boycott
3632	25	based prove	based, if proved
3633	2	He having	He, having
3633	15	-- the member	-- the Society
3633	18	wantyou	want you
3635	25	members	members'
3638	17	inconsisten	inconsistent
3639	19	FActors	Factors
3640	9	lightening	lightning
3640	14	him	one

PAGE	LINE	ERROR	CHANGE TO
3641	2	objectionto	objection to
3642	25	id double	is, is it true
3643	15	purpose	purposes
3645	8	thatexact	that exact
3646	10	Blue	"Blue
3647	12	thereis	there is
3648	15	worse	worst
3648	19	they	there
3649	22	yes.to	yes to
3650	18	have substantially	substantially
3653	9	course, composition	course, a composition
3654	16	it is	its
3656	11	thepart	the part
3659	25	ASCAPthat	ASCAP that
3661	2	bythe	by the
3661	2, 4, 5, 8, 11, 14 16, 19, 23	Government	government
3661	4	The Italian Society of	In the Italian Society,
3662	2	can reading the law	can, reading the law,
3662	3	Government	government
3662	11	InSweden	In Sweden
3662	12, 16	Government	government

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3622	13	product	performing
3662	14	SCandinavian	Scandinavian
3663	12, 16 19	Government	government
3664	4	theFrench	the French
3664	6	MexicanSociety	Mexican Society
3664	24	largeyou	large you
3664	24	common market	Common Market
3665	3	was, at	was at
3665	5	tige,	tive,
3665	14	Page 45	Page 145
3665	18	YOu	You
3665	19	there were	or
3665	24	Want to	Would you
3666	11	broadcasting	broadcasters
3666	24	were	(delete)
3667	15	ear	other
3668	13	of the Times.	from that time.
3669	16	informatioh	information
3669	24	surveilling	surveying
3670	2	makinguse	making use
3670	25	red	Red
3670	25	green	Green

PAGE	LINE	ERROR	CHANGE TO
3671	4	red	Red
3671	5	blue	Blue
3671	12	register all	register at all
3672	2	VAriety	Variety
3672	21	in1941	in 1941
3675	6	onASCAP's	ASCAP's
3679	9	organization like	organization, like
3679	10	else should	else, should
3679	10	numbers	numbers,
3679	15	rights because	rights, because
3679	16	themselves, and	themselves and
3679	18	Fink?	Finkelstein?
3681	7	anti-trust	antitrust
3681	8	SEptember	September
3682	17	networks	networks'
3682	24	owned	on the other hand
3683	15	opportunity be-	opportunity to develop b
3685	19	networks	networks'
3685	23	whatyou	what you
3686	9	include	conclude
3687	16	situationcreated	situation created
3689	14	lost	loss
3689	23	believe	belief

PAGE	LINE	ERROR	CHANGE TO
3691	11	Honow	Honor
3692	12	so called	so-called
3695	16	Fink	Finkelstein
3698	18	beint	being
3698	19	anti-trust	antitrust
3699	14	country	case
3699	17	know	known
3701	6	unwarranted	'unwarranted
3701	8	chairman of the board	Chairman of the Board
3701	9	directors and	Directors, and
3703	11	it of	it as
3703	17	Rhuska	Hruska
3704	22	unions. In	users, in
3705	7, 12	large scale	large-scale
3707	15	,today	, today
3708	15	certainway,	certain way,
3709	18	in1952	in 1952 ,
3709	24	RHUSKA	HRUSKA
3710	7	television network	Television Network
3711	10	nothing	not only
3711	24	are	were
3712	6	says	suits
3712	12	NBC number 1	number 1
3713	5	along	along without

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3715	4	oes	owes
3716	6	Rothbert,	Romberg,
3717	9	Performing	performing
3718	5	effect	affect
3719	17	access music	access to music
3720	24	CTB	CTN
3722	11	ask d is the witness about something	asked the witness about is something
3723	6	pub ishers	publishers
3724	11	coowners	co-owners
3724	22	independently with Society	independently of the Society
3725	21	wuld	would
3727	10	ininnumerable	in innumerable
3727	20	it is	is it
3727	20	.	?
3727	23	then	when
3727	24	wuld	would
3728	2	T hse	These
3728	17	hiw	his
3729	15	he	we
3729	16	perfor mance	performance
3730	9	selfevident	self-evident
3730	14	substantialproblems	substantial problems
3731	22	somehting	something

PAGE	LINE	ERROR	CHANGE TO
3732	4	that that	that
3732	6	.	?
3732	14	pre-isely	precisely
3733	2	a ttempting	attempting
3734	2	NB C	NBC
3734	6	nuclear	nucleus
3734	19	overwith	over with
3734	21	Dr.Stanton	Dr. Stanton
3735	2	M	I
3735	4, 11, 13	STanton	Stanton
3735	13	Dr.STanton	Dr. Stanton
3737	10	youstate	you state
3737	13	mine	mind
3737	23	fix	fixed
3737	23	us	use
3738	18	Albert	Alpert
3738	19	Any	Andy
3739	3	eliminate	illuminate
3740	2	Do you	May I
3740	7	"CBS's	"CBS'
3740	8	answer	'answer'
3740	8	spectre	'spectre'

PAGE	LINE	ERROR	CHANGE TO
3740	9	amended final	Amended Final
3740	10	judgment	Judgment
3740	12	per use	per-use
3740	12	basis, but	basis. But
3740	13	many if	many, if
3740	13	all ASCAP	all, ASCAP
3740	14	system and	system, and
3740	15	What then would	What, then would
3740	15	license."	license?"
3741	15	composition.	composition."
3741	20	"of	¶ A "--of
3741	24	basis, but	basis. But
3742	19	andif	and if
3743	17	leave	lead
3744	25	quesion	question
3746	3	,really	, really
3746	19	quandification	qualification
3747	14	Prag	Practicing

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM	Before. HON. MORRIS E. LIEB District Judge
v.	
ABC CAT EXCELSIOR OP CORPORATION, ABLMAC and PUBLISHERS	69 Civil 3748

New York, December 4, 1973

STENOGRAPHER'S MINUTES

Columbia Broadcasting System

vs. 69 Civ. 5740

American Society of Composers, et al.

New York, New York.
December 4, 1973 -
10:00 A.M.

(Trial resumed.)

HERMAN FINKELSTEIN resumed.

CROSS-EXAMINATION (continued)

BY MR. HRUSKA:

Q Mr. Finkelstein, on direct examination you described a number of historical incidents. Could you tell me what documents you reviewed, if any, to help refresh your recollectionregarding those incidents?

A It may surprise you, but none.

Q Do you know whether the advertising revenues of the CBS radio network increased or decreased during the 1940-41 period, in which the CBS radio network was not using ASCAP music?

A My recollection at this time is that it was not adversely affected.

Q What is the --

THE COURT: Are you trying to establish his knowledge of the situation or the fact?

MR. HRUSKA: I am trying to establish, your Honor, that he has no knowledge of the situation.

THE COURT: That is what I mean. The state of his knowledge.

Q Could you tell me the basis for your recollection in that regard.

A Yes. We followed, at that time, we followed what was going on at the network or in radio generally. It was quite important.

Q My question was limited to the CBS radio network.

A Well, I couldn't distinguish CBS from the other networks. We put the networks altogether and the stations. We separated the stations into those that we would have a 3 per cent rate apply for, those with the 5 and those with the 4 per cent rate and then the networks.

Q Let me approach it this way, Mr. Finkelstein.

Do you now believe that in the 1940-41 period you described you then had knowledge of the advertising revenues of the CBS radio network?

A Not of the advertising revenues, no. Just the fact that they hadn't fallen off.

THE COURT: You mean you didn't know what the

right? I mean but you know they hadn't fallen off.

A That's right.

Q What was the basis for your belief t in the 1940-41 that the advertising revenues of the CBS radio network had not fallen off?

MR. TOPKIS: I fail to understand the relevance of this line, your Honor, and if Mr. Hruska wants to put in the advertising revenues of the CBS radio network in that period by some competent means, perhaps we could discuss the relevance of that, but the state of Mr. Finkelstein's mind seems to me irrelevant.

THE COURT: Mr. Hruska wants to explain to me why he thinks it is relevant.

MR. HRUSKA: Right. In examination yesterday and I think it is highly questionable whether it was in response to a question which specifically elicited this information, Mr. Finkelstein made the statement that we are now examining him about -- that is the statement concerning the advertising revenues of the networks.

This was part, if it was to have any place in this case, and I personally do not believe it is relevant at all, but this was part of ASCAP's case to prove. They have attempted to do so through the examination of Mr. Finkelstein, and I think it is noteworthy also, your Honor,

& it during the course of an objection yesterday question, Mr. Topkis again referred to this point and I think we will be seeing this point referred to in post-trial papers.

THE COURT: I am not interested in that. The real question in my mind was indicated by the question I put to you when you first asked Mr. Finkelstein your question and it is whether the thing that is important here is that CBS's revenues actually fell off, if they did, which is implied in your line of questioning, or not, and not so much whether Mr. Finkelstein is correct or incorrect about it.

I really don't -- of course, it doesn't support his testimony, let's put it that way, if it turns out that his recollection is incorrect, but the significance of the incident seems to me to be affected by the facts and not by Mr. Finkelstein's recollection of the facts.

MR. HRUSKA: My only point is, your Honor, I do not believe Mr. Finkelstein had a real basis for the statement he made or at least I would like to determine what that basis is.

If it turns out that there is no basis for that statement, then I think we can just forget about this area entirely.

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I don't believe that this is a relevant point, but I don't want the record to stand with simply Mr. Finkelstein's statement about it unless we can explore whether there was any basis for that statement.

MR. TOPKIS: I would be inclined to agree that relevance is remote, but it looks to me as though CBS doesn't want to get to the fact and it prefers instead to argue with Mr. Finkelstein.

THE COURT: Overruled, Mr. Topkis. Let's hear what Mr. Finkelstein's basis is.

The facts, I continue to believe, control, but as long as he made a statement on the subject I would like to know the basis for the statement.

A I will have to get the question.

THE COURT: The question, Mr. Finkelstein, is what was the basis of your knowledge at the time, which you recall now, that CBS's advertising revenue had not fallen off?

A Well, there was a belief in ASCAP at the time, if it is appropriate for me to say that, that absent ASCAP music, the revenues would suffer substantially.

THE COURT: I would assume that you would hope so.

THE WITNESS: And we watched it for that purpose.

and it turned out that --

THE COURT: How did you watch it, though? Be specific.

THE WITNESS: I didn't personally get the reports.

THE COURT: How was it watched and how was it brought to your attention?

THE WITNESS: They were watching the programs, the advertising, the advertisers, whether any programs fell off, whether any advertisers discontinued their advertising.

THE COURT: In other words, the programs were monitored, is that it or what kind of inquiry was made as far as you know?

THE WITNESS: Well, after all the programs -- that is a matter of publication. The list of programs appears weekly in Broadcasting Magazine, so that it is easy to follow.

I didn't personally follow them. I got the reports of what was going on and I didn't ask for any figures at the time at all but I did know that the expectation of the Society that there would be a substantial diminution in the network income if they weren't using the ASCAP repertory was erroneous. It didn't happen that way.

THE COURT: Would it be fair to state that the basis for your statement was that the ASCAP staff members, whoever they were, charged with following the advertising on the networks, informed you and responsible officials in ASCAP that as far as they had been able to determine from their study, the situation, the revenues had not fallen off.

THE WITNESS: That is correct.

Q Did you or anybody at ASCAP as far as you know have knowledge as to the amounts that advertisers were paying the CBS radio network for advertising over the network?

A Well, I don't know what knowledge they had. I had no personal knowledge of that and I merely was testifying to what I understood to be the facts at that time.

Certainly what happened or didn't happen after the ASCAP compositions weren't being used by the network and the whole broadcasting industry.

Q Do you recall the Shenandoah proceeding in 1961 and 1962?

A Yes, I do.

Q And was that a proceeding instituted by the television stations in October of 1961?

A Well, if you say it was October, that is when

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it was. I know it was late 1961.

Q Yes. Well, I have here the Second Circuit decision to which or on which the date appears.

In that proceeding, just to try to collapse this, were the television stations seeking an ASCAP license that would have included not only programs obtained from television networks, but also perhaps programs made by independent producers?

A Yes, they were.

Q In other words, they wanted a license covering only locally originated programs?

A That's correct.

Q Do you recall that the contention put forward by the stations in that proceeding was that the independent producers could directly license the music used on their programs?

A Well, I don't know if the issue was put that way or not. Up to this point I have agreed with you about the issue.

I don't recall at this time, and I haven't reviewed the papers, to see what they were saying in their papers at that time about the ease of the --

Q Not the ease. Just the contention that the music performance rights needed on these independently-

produced programs could be obtained or should be or would be obtained --

A Should be.

Q Should be obtained by the producers of those programs?

A I agree with you that that is the position they took, that the producers of the programs should obtain the right of performance and our position was that the stations themselves did the performing under the copyright law and that the responsibility was theirs and under the consent decree, the Society wasn't required, under the amended final judgment, the Society was not required to offer a license to broadcasters that excluded programs produced by others than the broadcasters but performed by the broadcasters.

Q Do you recall also that at the end of 1961 or early in 1962, the ASCAP membership agreement was coming up for renewal?

MR. TOPKIS: Objection, your Honor. I don't understand the pertinence of this whole line of questioning.

MR. HRUSKA: I think it will become understandable, your Honor, in just two or three more questions.

THE COURT: I will allow it.

A The television agreement --

THE COURT: When did you say?

MR. HRUSKA: End of 1961 or beginning of 1962.

A The television agreement was expiring and therefore was up for renewal.

THE COURT: Let me be sure I understand.

Are you talking about ASCAP's agreements with the television networks or with its members?

THE WITNESS: No. At that time ASCAP had separate agreements with its members for rights other than television and then for television.

THE COURT: But what was coming to an end?

THE WITNESS: The television agreement with the Society's members. Also, they were coterminous with the agreements with the broadcasters.

Q Do you also recall, Mr, Finkelstein, that many ASCAP members indicated at that time that unless the stations, television stations --

THE COURT: This is as distinct from the networks?

MR. HRUSKA: Yes, your Honor. This was entirely a television station proceeding.

Q Do you recallthat many ASCAP members indicated at the time that unless the television stations dropped their application for this form of license, those members

would not authorize ASCAP to license those stations?

MR. TOPKIS: Objection, your Honor, on the ground that the term "many" is too vague to be useful here.

MR. HRUSKA: It is a term, your Honor, which was used by Mr. Finkelstein in his deposition and he also used the term "a substantial number", and I would like to examine him on that word and then perhaps we can quantify it.

THE COURT: All right. If he can cast any light on what the word "many" means.

THE WITNESS: Quite apart from the word "many,' I think the answer to your question is no, as you posed your question.

THE COURT: May I have the question read back?

(Question read.)

A The answer to the question is no,as you put the question.

Q There was an indication at the time, however, on the part of many ASCAP members that they did not want to authorize ASCAP to license television stations?

A I still have to answer the question no as you put it.

THE COURT: Let me ask it this way, then. Was there an articulated position by any

substantial group of members of ASCAP opposing the application of the stations for licenses?

A Perhaps the best way to answer that question, your Honor, is by stating what the fact was.

THE COURT: Please do. Everybody will be interested to know I am just starting my 250 page of notes.

THE WITNESS: The television agreement between the Society and its members provided that the proposed, the television agreement then being circulated for the period commencing January 1, 1952, provided that it was not to become effective until 80 per cent in dollar income from television, 80 per cent, members representing 80 per cent of the dollar distribution for television, and I don't remember now whether it was 80 per cent in number of the members and I don't think it was. I think it was 80 per cent of the domestic distribution -- until 80 per cent had come in with their consents to the extension, we had not acquired the 80 per cent as of the day when the hearing came on before Judge Ryan --

THE COURT: In Shenandoah?

THE WITNESS: In Shenandoah, and I advised the Court at that time that we had not secured the necessary consents to enter into any agreement with the publisher - with the television people at this time.

Judge Ryan's response to that was, well, you had better get the necessary 80 per cent, and I said, there is a board meeting this afternoon, that very afternoon, at which there will be present enough members to top the 80 per cent figure and I will deliver your Honor's message, I said.

And I did get those consents that day. Those are the facts, however they are to be interpreted.

THE COURT: Well, I don't understand how that relates to the application of the television stations for this licensing right which they asked for.

Does that mean that the 80 per cent consented to such a license?

A Well, they consented to whatever license eventuated. Mr. Hruska is putting an interpretation on some facts that I just --

THE COURT: You don't agree with?

THE WITNESS: I don't agree with at all.

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Q Let me ask it this way--was there any connection whatsoever between the Shenandoah application and the disinclination on the part of many ASCAP members to authorize ASCAP to lisence television stations?

MR. TOPKIS: Objection, your Honor. There is no testimony here about disinclination.

MR. HRUSKA: I am asking the question as to whether there was such a connection.

MR. TOPKIS: Well, the question also assumes that there was a disinclination and I know of none.

THE COURT: I think so but I think the question can be put in such a way so there is no assumption. See if this satisfies everybody.

Mr. Finkelstein, was a substantial reason for the failure to secure the 80 per cent up to the time when Judge Ryan suggested that you should get that approval an unwillingness on the part of any substantial number of members to accede to the request of the television stations for the license indicated in Shenendoah?

A I heard no such observation by any member. The only observation I heard was those people who wouldn't sign, we want to see what kind of agreement you propose to come up with this time; how much money; they weren't thinking at all, so far as I know, they weren't thinking of the kind

of agreement but they were thinking very much of the kind of money they would be getting if they deposited their rights with the Society.

Q Mr. Finkelstein, I would like to show you a portion of your deposition on page 506 and 507 and so that you can follow it, I will give you a copy of the transcript of that part.

MR. TOPKIS: Is there a page 506, may I inquire? I don't have one in my copy.

MR. HRUSKA: There is indeed.

MR. TOPKIS: Since this was supplied to us by our friends, I wonder if they would give me a copy of page 506.

MR. HRUSKA: By your good friends, you mean who?

MR. TOPKIS: You.

MR. HRUSKA: I believe the depositions were supplied by the Southern District Court Reporters but we will be happy to give you a copy.

THE COURT: While Mr. Finkelstein is reading it, why don't you give it at least to Mr. Topkis to read.

Q Now, we were at a part of the deposition where we happened to be discussing something a little different and that is ASCAP's correspondence with a radio station with the call letters KBER and you stated at line 12, "You are

now assuming---"

A Line 12 of 506?

Q Yes, sir.

"You are now assuming that a station, implicit in your question is the assumption that a station has a right, indeed the need to insist that ASCAP exist and operate to the convenience of that station and so you find ASCAP, in which the members deposited television rights only on the insistence of the Federal Court.

"The members didn't say we want to get together and gang up on the broadcasting industry and license these rights collectively. Quite the contrary.

"In 1962 or at the end of 1961, some members, a substantial number, said the broadcasting industry does not appear to be of a mind to pay for this repertoire what we think it is worth and some of them, whether they thought they would do better licensing individually or what, in any event they didn't think that ASCAP was in a position to get for their works the performance on television the amount that those works were worth in their opinion and when I told Judge Ryan on the application of Shenandoah, at the end of 1961, that the Society had not acquired the television rights for the period commencing January 1st, 1962, and that I had my doubts as to whether it would acquire those rights,

Judge Ryan on the insistance of counsel for Shenendoah, instructed me to report to ASCAP that the Court expected ASCAP to deliver those rights to the broadcaster."

Now, I would like to ask you, on the basis of that testimony, Mr. Finkelstein, whether your recollection is now refreshed that there was a connection indeed between the Shenandoah application and the failure at this time of ASCAP's obtaining from members the sufficient number of consents to license television stations.

MR. TOPKIS: Your Honor, what are we wasting time on? That's just what Mr. Finkelstein said. He said they were worried about the money.

THE COURT: Now he asks him whether he thinks differently on the basis of what he read.

MR. TOPKIS: But it is just what he said before.

A Mr. Topkis took the words out of my mouth.

THE COURT: Overruled.

A Mr. Hruska--

THE COURT: That's for Mr. Finkelstein to say if he thinks it is what he said before.

A Mr. Hruska, I was surprised at almost the identity of language that I used extemporaneously a little while ago and that I used extemporaneously back at 506.

THE COURT: Would you have said that, if Mr. Topkis--

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A Yes. I motioned Mr. Topkis to sit down.

THE COURT: Your witness is very well able to answer for himself.

MR. TOPKIS: But I objected to reading two or three pages of material paralleling what he just said.

THE COURT: I may or may not agree with your second instruction of the passage but I don't think it is unreasonable for Mr. Hruska to probe and see whether Mr. Finkelstein will change his mind and I think sometimes it takes more time to argue these things out.

MR. HRUSKA: I am content to leave upon that. I think the deposition made all the points I wanted to make.

Q Did you attend ASCAP's West Coast meeting in March of 1973?

A Yes, I did.

Q And do you recall the substance of this statement having been made at that meeting, the statement being, in words or substance--

A Made by whom, Mr. Hruska, please?

Q Well, I'll get to that in a moment.

I first of all want to know whether you recall such a statement.

THE COURT: This is March of 1973?

MR. HRUSKA: Yes.

THE COURT: What meeting?

MR. HRUSKA: ASCAP's West Coast meeting which I believe was held in Beverly Hills.

THE COURT: You want to know whether Mr. Finkelstein remembers a statement made there?

MR. HRUSKA: Yes.

THE COURT: Why don't you tell us who it was by.

MR. HRUSKA: All right.

THE COURT: If you are going to ask him.

MR. HRUSKA: Yes. I believe the statement was made by Mr. Arthur Schwartz.

Q Who was Mr. Arthur Schwartz?

A He was a member of the Board of Directors.

THE COURT: He is the New York attorney?

A No. This is a composer.

Q And he is also a member of the ASCAP Financial Committee?

A Yes, he is.

Q And he is the Chairman of the Financial Committee?

A Yes.

Q Did he make a speech at that meeting?

A Yes, he did.

Q And did he make a statement along these lines--

CBS is trying to get a contract so that it can make individual deals for royalty rates with composers.

ASCAP feels that one composer on his own will be forced to accept anything that CBS offers.

A I don't remember that but I would have endorsed the statement.

Q Do you recall if there were any discussions of that statement at the meeting?

A No, I don't recall.

Q Or a particular reaction?

A No, I don't.

Q Was a transcript of that meeting made?

A Oh, yes.

Q Would it be possible to produce a transcript of that meeting?

A If the statement was made. I assume that--I assumed when you made that statement that you had a transcript before you.

Q No. I did not. I happened to have a newspaper clipping on it.

THE COURT: If there is a transcript of it, will you find out, Mr. Topkis, and--

MR. TOPKIS: Yes, your Honor. We better not hold any meetings before the trial ends, though.

Q I would like to see, Mr. Finkelstein, whether you agree with the following statement which I would like to read to you and it is very short.

"The radio station or network or the television station or network has its option to take a license on a blanket basis or on what is called a per program basis.

"That is still a blanket basis but the payment is in relation to those programs which use music in the ASCAP repertoire.

"The option is with the station. They rarely resort to that option because once a station starts to pick or choose the compositions on a program in relation to where it lies, the programs are going to suffer and the business will suffer."

A Oh, I think that is true if the station--you are talking about the stations now? I think that if a station spends its time deciding, having somebody on the staff decide whether he can save a dollar by using one composition instead of another, I think the programs will suffer.

That doesn't mean their dollars will suffer but the public will be injured, I think. That's my opinion.

Q Does that statement apply to a television network program?

A Television network?

Q Television network programs.

A Well, you know, that is my opinion, that the public would suffer when you got into that kind of situation.

I think I said yesterday that the composer or publisher who either didn't do the networks bidding or wasn't the easy kind of person to acquire rights from, that in a case where they could substitute one thing for another, that fellow wouldn't stand a chance of getting his works heard.

MR. HRUSKA: Your Honor, I would like to move to strike the last statement beginning with the words "I think I said yesterday."

THE COURT: I'll strike it. If it is in there yesterday, Mr. Finkelstein, it is in there.

MR. HRUSKA: Now the deposition on page 162, please.

THE COURT: What page?

MR. HRUSKA: 162, your Honor.

Q Do you have page 162?

A Yes, I do.

Q I would like to read you a portion beginning at line 12:

"Question. If CTN had no license at all from

ASCAP, would it be in the position of having to dictate to the producers of its programs which compositions may be performed and even to censor compositions already performed on present recorded broadcasts?

"Answer. No. My answer may be due to the form of the question.

"Question. You don't like the words 'would have to'?

"Answer. That's right, I don't.

"Question. Would they do it?

"Answer. Yes.

"Question. Would they have any realistic alternative to doing it, other than I am excluding obtaining a license from ASCAP?

"Answer. Having once decided that they would do business that way, everything else would follow.

"Question. They would have no realistic alternatives?

"Answer. I would say that they would have made the decision in the first instance and having made that decision all these other things follow.

"Question. The dictation and the censorship?

"Answer. That's right.

"Question. The dictation and the censorship

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would apply to variety programs?

"Answer. Oh, any program."

Is that testimony true, Mr. Finkelstein?

A I think so.

THE COURT: Will you read me the key question starting at line 12, page 162, so I get it in context?

MR. HRUSKA: Yes, your Honor.

"Question. If CTN had no license at all from ASCAP, would it be in the position of having to dictate to the producers its programs which compositions may be performed and even to censor compositions already performed on pre-recorded broadcasts."

THE WITNESS: I am sorry but would you continue with that quotation?

MR. HRUSKA: I just read it, Mr. Finkelstein. His Honor asked me to read or to re-read--

THE COURT: I just want it read so I could understand the answer better.

THE WITNESS: But I think to understand the answer you have to continue with the questions and answers in the deposition.

THE COURT: Well, I'll leave it up to Mr. Topkis.

MR. TOPKIS: Mr. Finkelstein objected to the form of the question, "My answer was no."

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THE COURT: I understand that.

MR. HRUSKA: So we went on from there.

Q Could you turn to page 173 of the deposition, Mr. Finkelstein.

At line 16:

"Question. Is it true that the license that NBC requests"--which is the limited, the nucleus -- "would be unworkable because it would require that NBC dictate the compositions which might be performed regardless of the performers' desires.

"Answer. Yes, and that shows what I mean by unworkable."

Now, turning to page 175, after a bit of colloquy back and forth, line 22--

A Do you mind if I just read the intervening part? May I just read that to myself?

Q Of course, yes.

A And where are you now?

Q 175, line 22:

"Question. And that is an undesirable state of affairs for NBC?

"Answer. No. It is undesirable for the public. Oh, I think for NBC for the long pull, too.

"Question. Why?

"Answer. Because I think it would not be fulfilling its interest as a broadcaster and that would boomerang

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ultimately."

Is that testimony true?

MR. TOPKIS: Go on with the answer, please.

A Now, please. You know, an incomplete answer--

Q You may read the rest of it.

THE COURT: Mr. Finkelstein, Mr. Hruska, first of all--I don't think there is any point in asking the question, is that testimony true with regard to this material.

If you want to ask whether that fairly shows or whether Mr. Finkelstein so testified and that what you have read fairly reflects his views on the question, I think that is a proper question and Mr. Finkelstein can say yes or if it does not, he can read further or qualify it.

MR. HRUSKA: Thank you, your Honor.

MR. TOPKIS: Surely, your Honor, when you read a man an answer, you read the whole answer.

THE COURT: Mr. Hruska is entitled to ask Mr. Finkelstein what he wants to and Mr. Finkelstein and you are entitled to and obligated to bring out to me whatever you think is necessary for the picture to be completely presented.

Now, I don't mean if he stopped in the middle of a sentence, and I don't have it before me and I don't know.

MR. TOPKIS: He stopped in the middle of an answer. There are two sentences to it and he read one and

it seems to me a waste of time.

THE COURT: I would agree if you stopped in the middle of an answer, a request that you read the complete answer would be proper.

MR. HRUSKA: Yes, I did stop in the middle of the answer and I think by reading the next sentence it will illustrate why.

The next sentence is "But this might make an immediate gain by having the amount they paid lowered and then come back to the existing system which in my opinion is what they do after they have spent enough money to beat down the price.

THE COURT: I disagree that that is irrelevant to the first part of the answer.

In any event, I think it is better for me to make that judgment.

Now, as read to you by Mr. Hruska, does the answer you gave on deposition accord with your views with regard to the material about which you were questioned?

A Yes, it does, your Honor. May I supplement it?

Q I would like to read a little bit more. Also, on page 176, line 11.

"Question. Because if NBC persisted in this limited repertoire license, it would in the long run be

injured?

"Answer. I think so.

"Apparently NBC doesn't nor does CBS apparently. They didn't think so back in 1940-'41. I think they were injured in the long run.

"Question. If CTN had no ASCAP license at all and persisted in not having an ASCAP license, it, too, in the long run would be injured?

"Answer. I think so. I think so and if they conspired with NBC to do it, I think they would both be injured, in the long run but they would save some immediate dollars but ultimately it would destroy the American broadcasting system.

"Question. How about CTN? Would it destroy CTN?

"Answer. Oh, if the American broadcasting system is destroyed, I suppose CTN would fall with it."

Does that testimony adequately and fairly represent your views?

A Well, I don't know if it adequate represents my views. To the extent that they are expressed here, they are expressed correctly.

It is my believe, my opinion, that if CBS exercises the power that it has, being in a position where it buys time, buys material, where it can sell time and buy

material for 200 stations in prime time, 200 of the best stations in America, and if anybody doesn't meet CBS' terms, they are foreclosed from that market, I think that if CBS exercises the power that it has without regard to the genuine public interest, as I see it, and we ill differ about what the genuine public interest is, but I think if I were CBS, I wouldn't do it. I would just look at the long run and say, this is not the thing to do but we differ on that and I've expressed my views and you are reading them.

Q Now I would like to show you an affidavit by you, Mr. Finkelstein, which has been marked for identification as Plaintiff's Exhibit 14.

If you will turn to page 8--

THE COURT: What date is that?

MR. HRUSKA: First of all, the date is July 10, 1970. It was submitted in the NBC proceeding.

THE COURT: All right. What page are you referring to?

MR. HRUSKA: At the moment I am referring to page 8, your Honor.

Q Now, you see at the top of page 8, Mr. Finkelstein, there is a quotation from a portion of an affidavit submitted by Mr. Donald Sipes in this present proceeding, CBS against ASCAP.

THE COURT: In other words, Mr. Finkelstein was quoting Mr. Sipes' affidavit?

MR. HRUSKA: Precisely.

Q Do you see that, Mr. Finkelstein?

A I do see it.

I would like to read it.

Q Would you like to read that?

A Yes. If you don't mind.

Q No. I don't mind at all.

A I've read the quote.

Q Do you recall having stated, Mr. Finkelstein, that those four reasons described in Mr. Sipes' affidavit which you quote on page 8, are the reasons why NBC, as applied to BNC, if it took the nucleus license, would have gotten itself in a position of having to dictate which compositions may be performed and even to censor compositions already performed on pre-recorded broadcasts, and in that connection I ask you to look at paragraph 14.

A Now, what's your question?

I think you just asked me to look at paragraph 14.

Q No. I had asked you a question.

(Question read.)

A The Sipes took one position and Rubin took the

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contrary position.

Rubin said that they--

Q I have asked you about your position, sir.

THE COURT: Well, that's a complicated question. Let Mr. Finkelstein proceed with it.

I don't understand the background so I need the background.

A This is in the NBC proceeding. Rubin for NBC was saying that they didn't need the ASCAP license for football games or bands or whatever; that the bands--when you have a parade, all that music is cleared in advance, football games, it's all cleared in advance, that kind of thing.

And, therefore, the system that they were suggesting, the system under which they would ask for 2700 or 2200 licenses plus certain libraries, that kind of a license to be given by ASCAP plus something for these new numbers that we talked about yesterday, that that would be a feasible way of conducting their business.

Our position was that they knew very well that that is not the way they would anticipate conducting their business; that if they--that as a matter of fact, if you look at the Sipes affidavit, Sipes points out that there are these uses that you don't know about in advance. He talks about adlibing and that kind of thing.

THE COURT: So you made Sipes your witness to that?

A And in effect we said that in view of what Sipes says, that NBC would be--is now proposing that they would curb the kind of thing that Sipes says normally goes on.

THE COURT: And did you include that the reasons that Sipes put forward and which you apparently used in support of your position in that affidavit, would require NBC to dictate what music was needed and to censor?

A That they proposed to do just that in view of what Mr. Sipes said was the normal practice.

THE COURT: Can I ask you what censor means in this context?

A They would--that they had the necessary control, that they would either black out the things that didn't--which they could do--black out the things that they didn't approve or insist that the things that they approved be the things that were used.

Q And do you recall having stated on this occasion that this need to dictate and censor made or was the reason why the NBC nucleus license approach was unworkable?

MR. TOPKIS: Could you call our attention to a portion--

THE COURT: Eeven if it is not stated here, it was

stated on one other quotation on the same subject and Mr. Finkelstein ratified that statement in my opinion.

A Unworkable in the sense that I was using the word unworkable.

THE COURT: Always in the sense that anybody uses a word, I suppose.

A In the context, your Honor.

MR. HRUSKA: Your Honor, I would like to offer PX 14 in evidence.

It is a document which I think is necessary for a full understanding of the testimony which has been given this morning. It is the key document in the NBC proceeding and I think it is one of the most important documents of this case.

MR. TOPKIS: How can I possibly object to one of the most important documents in this case, your Honor.

THE COURT: I don't know. I'll receive it.

I take it Miss Kearse feels the same way that Mr. Topkis does.

MR. TOPKIS: Beaten down.

MISS KEARSE: Yes, your Honor.

(PX 14 received in evidence.)

xx

Q I would like you to assume, Mr. Finkelstein, that the CBS television network cancelled its ASCAP license,

that the ABC and NBC television networks retained their ASCAP licenses.

Would ASCAP continue under those circumstances to monitor the CTN use of music and report such use to its members?

A You pose a world in which CBS doesn't have the ASCAP license.

Q Right.

A Just so I understand the question. And you asked whether ASCAP would monitor CBS performances?

Q Right.

A You had another assumption in there or a question--would we report the results to our members.

Q Yes.

A I would say that if CBS did not have an ASCAP license, he would have an obligation to find out whether they were infringing and if they were infringing, to sue.

We would not report to the membership what the uses were unless we had to get the consent of the members to bring a suit in his name.

Q And you would do that even if a substantial number of ASCAP members were directly licensing CBS?

A Oh, if the member licensed CBS that would not be an infringement. That would be of no concern to us. I would

only monitor it for purposes of determining whether there were infringements.

Q Perhaps I didn't make myself clear.

Your decision to monitor CTN use would not be effected by the fact that some members of ASCAP were licensing CBS directly?

MR. TOPKIS: Is the assumption, and some were not?

THE COURT: That is what I assumed and therefore it seems to me the answer has to be that you have to monitor those who are left.

Is that correct?

A That is correct, your Honor.

Q Do you recall why it was, Mr. Finkelstein, that ASCAP declined to monitor the establishments on whose behalf 3M had obtained licenses?

A Yes.

Q Why was that?

A We don't--I am sorry. You said that ASCAP refused to monitor but I don't think ASCAP ever refused to monitor those uses. We do monitor them.

If we--if an ASCAP representative is checking on uses of ASCAP music and he comes across a place that has a 3M license, that is just something that we can't sue on because the place is licensed.

Q Suppose they don't --

A But we don't go out to check 3M licenses.

Q Suppose the ASCAP field man comes across a place which used to have a 3M license, but that 3M license has now expired in respect of that establishment.

MR. TOPKIS: If your Honor please, I would just like to have the record note that I didn't ask Mr. Finkelstein anything about 3M on the basis of my belief that it is all irrelevant. If your Honor wants to hear the testimony I have no objection.

THE COURT: You mean that the whole 3M subject is irrelevant.

MR. TOPKIS: Yes.

THE COURT: That raises another question whether it is proper cross-examination but I don't consider the 3M incident irrelevant nor do I consider it conclusive, of course, but I hope the cross-examination on this will be limited.

MR. HRUSKA: I think it is, your Honor, yes.

I would hope it doesn't consume more than five minutes, if that.

THE COURT: The question is, if one of your people came across a song played on the 3M setup, let's call it, after the 3M license had expired, would you do

something about it, if you know.

A Yes. Well, that is a judgment that I would have to make and we have reports on about a thousand infringements a year and I have limited the number of lawsuits that will start in any year to somewhere between 300 and 400, and I don't think that we ought to use the Federal courts to any greater extent than that.

I think that that is the maximum that we are entitled to use the courts for.

THE COURT: Thank you. I wish all our litigants were as concerned.

A Now, then, if a report came in about a place that said this is a 3M license and when they sold us, -- when 3M sold us this machine, they said we had a right to play anything on these tapes and our members had issued a license -- now, that would be for a three-year period -- for that [illegible] I think that I would have cases that would be more attractive for me than that kind of litigation, considering the defenses that I would interpose if I were a defendant in the case.

Q In 1964 and 1965 and let me take in 1966, also, did you have any discussions, conversations, with any ASCAP members on the subject of policing establishments which had obtained the 3M equipment and on whose behalf

3M had obtained direct licenses from publishers?

A I am quite sure there were no discussions in '64 or '65. There was a later time when there were discussions. Whether that was 1966 or '67, I just don't remember, but you probably know from other witnesses.

Q Do you recall with whom youhad such discussions?

A Yes. There was a time Mr. Chiantia came into my office and asked if we would take over the agreements that members had entered into with 3M, now that the three years had expired. That would fix the time. It was after the three years had expired.

And would we monitor -- they would give us a list of the 3M places and would we go out and monitor those places and bring infringement suits against all of them because none of them had licenses at that time.

And I said, no, I don't think -- I said there are two things -- one, I don't think we are entitled to spend the money of the other members to conduct this kind of a very expensive investigation, the benefits of which have to go to the members who signed up for the 700 compositions and, secondly, I think that that also was tied in with ASCAP licensing 3M from there out, and I said that the consent decree provides that when you have specific compositions, the member is supposed to do the licensing and

not ASCAP and that I didn't want -- I didn't want to do anything that interfered with something that had been started, our individual members licensing.

I said, now, they can go right through with it and I am not going to interfere at all for two reasons -- one, the amended final judgment itself and second, the right of other members to insist that we not spend their money to police something that would benefit only a very limited number of members.

Q I would like to give you two cases, very brief. And then ask you one or two questions about those cases.

Case Number 1, an ASCAP field man detects a restaurant which ones had an ASCAP license, but no longer does --

THE COURT: We are away from 3M now?

MR. HRUSKA: Not quite, your Honor. But this will be the last series.

Q And that restaurant is playing a cassette manufactured by let's say RCA.

Do you have that firmly in mind, sir?

A Yes.

Q Case Number 2, a field --

A You haven't said anything about what is on the cassette.

Q I haven't asked you a question yet. I just wanted to know whether you have Case Number 1 firmly in mind.

A Right.

Q Case Number 2, an ASCAP field man detects a restaurant which ones operated under a 3M license, but no longer does and that restaurant is playing a cassette manufactured by 3M.

The question is, what is the difference between those two situations which would lead ASCAP to police and commence an infringement action against Restaurant Number 1 but not against Restaurant Number 2.

MR. TOPKIS: I am puzzled by one assumption. How can the ASCAP field man know that the restaurant proprietor once had a 3M license and no longer does. I don't know any way.

THE COURT: Maybe it is posted on the wall.

MR. TOPKIS: On that assumption, I will sit down.

THE COURT: Well, assuming, and I must say I think the assumption is somewhat artificial but assuming that the monitor, or whatever you call your policeman, knew the facts as to both cases -- would, upon his report, would ASCAP take action against the first restaurant and not

the second one?

A Well, I will have to get some more facts, your Honor, before I can answer it.

THE COURT: Ask any facts you want.

A In the RCA case, did RCA sell them this cassette and tell him that he had a license to perform?

Q No. In Case Number 1, the restaurant had an ASCAP license from ASCAP at the time it bought the cassette player and the RCA tape, but by the time the field man arrives, that license has expired and the restaurant has not renewed its license. It is just playing that tape without a license.

A Oh, I thinkthat our -- I think that the ASCAP representative would ask him whether he has changed his policy. What did he have before? What kind of a use of music did he have previously?

Q The same use he is making now. He has got a lot of customers sitting around and he is playing the cassette for background music for the customers.

A I see. He had an ASCAP license and he played RCA cassettes or any other cassette.

Q Right.

A He had loads of them and he just put something on, right?

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Q Exactly.

A And now he doesn't have an ASCAP license any more and he says to the representative, get lost, I don't want any ASCAP license, I don't want to do business with you and your question is, under the circumstances, would we sue him for infringement? Would we consider him a candidate for an infringement suit.

Q Right.

A And is it apt to get past my desk.

Q Yes.

A And I would say yes, I think that would get past my desk.

THE COURT: That means he might be sued?

THE WITNESS: Yes, might be sued. Might be a candidate. If there wasn't anything more pressing than that one, he would be one of the three or four hundred.

THE COURT: Right.

A The other case is, and I think this is what you are saying about the 3M thing, Mr. Hruska, that the restaurant is playing the 3M700 tape --

THE COURT: After its license expired?

A After its license expired, so that it had a license when it bought that tape from 3M and that license has expired.

I answered that question before. I said that I would not consider that a candidate for the three or 400 suits that I would authorize.

Q And the difference being what?

A The difference being the defense that could be interposed. That brings up the whole subject, (1), now, you know, I have gotten a lot of experience in facing defendants -- the defense would be, and you can't, Mr. Hruska, if you represented them, you would probably be doing this -- so would I, probably, if I represented them -- but you would be raising the whole issue of the ASCAP amended final judgment.

THE COURT: You mean that they might be able to argue for example this they were entitled to a license just by use and application?

THE WITNESS: Judge, your Honor, judging by past defenses that I have had to face, I would expect this kind of a defense to be interposed somewhere along the line and they don't, these people, you never know where these things are going to come from and I say that every case that we bring must be prepared on the assumption that it is apt to go to the United States Supreme Court, so we prepare our cases pretty well and we think, before we sue anything, we think about what the defenses might be.

In a case like this, I am sure that you would have, somewhere along the line and you never can tell what the defendant would interposit, that ASCAP was violating the antitrust laws, that it was bringing this suit so as to make it impossible for individual members to license their works individually.

THE COURT: In other words, you are saying, and don't think that my asking the question indicates any point of view towards the answer one way or the other, that as a matter of policy you as general counsel for ASCAP have decided not to test the questions inherent in use by former licensees of the 3M tape because there could be unforseen decisions which you don't think it is in the interests of ASCAP to enforce?

THE COURT: Whether they are decisions or not, your Honor, the trouble of litigating one of these things, whenyou have more pressing claims -- if all the cases that we had were prosecuted, then I would say, well, you know, we can afford to go into this kind of thing probably, if I am not worried too much about the results. Apart from the litigation itself I lean over backwards, I think, in interpreting the amended final judgment and when there is a provision in this judgment saying that with respect to specified compositions our members shall have the right

to license on their own -- when they exercise that right I want to keep away from everything involved in it as much as I can.

THE COURT: Then the other side of the coin which you pointed out before, which is that to police that particular situation would be to use general revenues for the benefit of few members.

THE WITNESS: Well, Mr. Hruska, though, is taking an isolated case, rather than the whole group of them and I am responding to his isolated case.

THE COURT: I think I understand on both sides what the positions are on the point.

Q I would like to show you a document that has been marked as PX104 for identification which is a letter from Mr. Lindgren to you, dated -- I think maybe your copy is more legible than mine -- can you tell me the date on that?

A June 25, 1960.

Q 1969?

A Oh, '69. Thank you.

THE COURT: Is Lindgren with AGAC?

MR. HRUSKA: No. He is with 3M, your Honor.

THE COURT: He was the producer or the --

MR. HRUSKA: Right.

Q I would like you toread the letter and tell me whether the statements made by Mr. Lindgren in the first paragraph were true at that time.

A May I read this?

MR. BRUSKA: You may certainly read it.

THE WITNESS: Because here is a letter -- you have handed me a letter from Mr. Lindgren addressed to me, dated June 25, 1969. I seem to recall something about it I haven't seen this since the time it came in, and I am just trying to refresh my recollection about what -- am trying to see if this brings back to mind what he was talking about.

(Pause.)

A This refers to some incident in Rapid City, South Dakota, and my recollection is that we checked in Rapid City, South Dakota, and found that there was no basis for Mr. Lindgren's statement.

Q Did any reports come to your attention that ASCAP field men had been visiting installations which had once been operatingunder 3M licenses, but no longer were, and had indicated to those establishments that they were infringing and that they had to get an ASCAP license and if they didn't get an ASCAP license there was a possibility that they would be sued for infringement?

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A I don't recall any such case coming across my desk.

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Q Do you recall, Mr. Finkelstein, having made a statement to the effect that if telecasters, and by that I mean to take in stations and networks, had to go back to the writers of music in old theatrical motion pictures and the publishers of that music who had clauses in their contracts that the rights granted to the producers of the films were only for use in theatres, that that would be an almost insuperable block to the free marketing of those films in television today?

MR. TOPKIS: Could I have the question back, please, your Honor?

(Question read.)

A I would like to see the statement and the context in which it was made or I would like to tell you what my views are.

Q You have no present recollection of having made a statement of that substance?

A I don't recall having made that statement at this time.

You might refresh my recollection if you will, Mr. Eruska.

Q Did you ever conjecture along those lines?

A Along those lines, yes.

MR. TOPKIS: Excuse me, but the relevance

of Mr. Finkelstein's conjecturing escapes me.

THE COURT: Sustained.

Q Well, is it a statement with which you agree?

A I would have to put it in the context, I could make a statement about the subject, if you want me to but I -- just putting that statement on its own, as you have done it, no, I couldn't agree with it.

Q Maybe to shorten this, why don't you simply make a statement on the subject?

A Yes. I would say that one of the purposes, perhaps the leading purpose of ASCAP, is to provide a ready solution for things that might seem to have insuperable obstacles, insurmountable obstacles, excuse me.

You know, we have a problem right now in the new mass media and there doesn't seem to be any way that we can find to make it possible to, with ease, work out a system under which the new computer can record and reproduce copyrighted things. You get that in music and, generally, ASCAP was conceived to avoid all those problems and if you are asking the question of whether ASCAP solves that kind of problem, there would be problems, you know -- you are suggesting a situation in which the writers or publisher or whoever does it is granted synchronization rights and performance rights for United States theatres

and now they want to use that on television. So long as they have an ASCAP license they don't have to worry about anything at all. If they don't have an ASCAP license, you would have to be concerned about -- they have the problems of negotiating.

Now, for the most part, they won't have a problem because the writer or publisher has got to play along or his works are going to be boycotted. He is still in the writing profession and the publishing business.

So that by and large, they won't have a problem but they will have a problem here and there. There are some writers and some publishers who say, no matter what happens we are going to insist on getting separate clearance and they would even do it with CBS regardless of consequences, as long as we are all human beings, and you find that but now, on that CBS would just say, well, we won't use that one or we will use it and let him sue us and we will just pay whatever the Court finds as a reasonable value.

Q Is it a fair statement that in and around 1958 you thought this problem was insuperable but today you do not?

A You know that that is entirely possible, that I have revised my thinking and of course, the television business has changed on, well, all around it has

changed, very substantially.

Q Do you recall what the basis or bases were in and around 1963 for your believing that this problem was insuperable?

A I thought you said '58 before.

THE COURT: Which is it?

MR. HRUSKA: '58.

MR. TOPKIS: There has been no testimony that the witness so believed in 1958. Apparently there is a document that shows it. Can't we stop playing games and show it?

THE COURT: I think if you want me to understand what his views were in '58 you should show it to us.

Let me suggest that we break for the morning at this time and you can get the material ready.

(Recess.)

Q During the recess we just had, Mr. Finkelstein, did you have an occasion to read your testimony at page 23 of PX 565, which represents a portion of the hearings before sub-committee number 5 of the Select Committee on Small Business, House of Representatives, in March and April of 1958?

A I don't think it was testimony. I think it was a statement. I did read it.

Q Well, there are questions and answers in this portion of the transcript.

A Oh.

Q You did read it?

A I did read it.

Q I'll put a copy before you again.

Could you look about the middle of the page, where Mr. Moore is asking you a question--

THE COURT: Is that a Congressman?

THE WITNESS: Yes, Congressman from Missouri.

Q And in the middle of the question, he says, which I think really--

A No, West Virginia, I guess.

Now Governor of the State, I believe.

Q The substance of the question is contained, I believe, in this clause--say we have Paramount and Warner

Brothers selling a complete stock of items. Does ASCAP go into the licensing of the use of the music in that particular type of commodity.

Your answer to that was, if that music and those pictures is used in theatres, ASCAP is not in that field. If that is used in television--and Mr. Moore interrupted and said, in television primarily, and you responded, yes, ASCAP is in that field because the license to telecasters includes anything of the repertoire, however used.

Mr. Moore asked, and would it include the sales of these stocks of old films. You answered, when used on television, yes, sir.

He said, I have no further questions, and then you said, that helps the marketing, by the way, if they--meaning, I believe, telecasters, in this instance--had to go back to the writers of those old movies and the publishers who had clauses in their contracts that the rights granted are only for use in theatres as now known there would be an almost insuperable block to the free marketing of those films in television today I am afraid. That is conjecture on my part, of course.

Now, do you recall having made that statement?

A I do.

Q And could you tell me what then was the basis

for your belief regarding the quote"almost insuperable block"?

A Well, we are back in 1958 when there were all these old films, going back to who knows when, and unlike television today, and I was making the point that--by the way, I wasn't testifying, as I said, but making a statement; I was there as counsel for ASCAP--and I said that I thought that in trying to clear these old pictures, there would be foreign things, there are all kinds of old things at that time, ASCAP solved what would otherwise be what I thought then would be an insuperable obstacle and I think I've said time and again that what ASCAP offers makes it unnecessary to have any of these problems.

But, in the present-day television, we are talking about the network, they have a limited number of films; they are all relative--or of relatively recent vintage--the writers and publishers who are involved with music rights are interested in the particulars they are going to get cut of it if CBS offers the right number of dollars; they ought to not have any problems in the kind of films they are showing today.

Back in 1956 it was quite a different ball game.

Q Would it be fair to say, Mr. Finkelstein, that in 1956, you believed that a telecaster with an inventory of old movies would have considerable difficulties in obtaining

the music performance rights to music in those films because of the fact that the music had already been recorded in the films without such rights granted directly to the telecaster whereas, if I may finish, in today's world, the telecaster would not have the equivalent problem because the owners of music in those films would be easier to deal with.

A No, that is not correct, Mr. Hruska, and I don't think in 1958 the telecaster had the inventory of films that they have today.

There, they were--there the films were still owned by the producers. They hadn't granted out a lot of licenses to the extent that they have done today.

Today CBS will have long-term licenses for more films than it can use at this time. It doesn't use anywhere near all the films that it has a right to use.

THE COURT: When you say right, you mean the right to perform the music?

THE WITNESS: No, the right from the producer to exhibit those films on, to telecast those films. I say they have acquired far more rights to televise films and let's forget the music rights for the moment, than they need, so they have a wide range of choice in what they are going to broadcast.

But we were talking about, at that time, the sup-

ply of old films and the service that ASCAP performed in clearing all the roadblocks that might possibly exist.

MR. HRUSKA: Your Honor, perhaps a loose end from yesterday before I turn to another subject.

At page 3724 of yesterday's transcript, in the first question and answer given on the top of that page and particularly the portion of the answer at lines 18 through 20, that portion, your Honor, I submit is inconsistent with the document which was the basis of the examination at that time, that document being PX 568 which is a portion of Mr. Finkelstein's testimony in the Cascade case, what Mr. Topkis referred to as the Yakima action at page 17 and the purpose of all this, your Honor, is simply to offer that portion of the deposition in evidence as inconsistent with that testimony.

THE COURT: I'll look it over at an appropriate time and make a ruling on it.

What's the exhibit number?

MR. HRUSKA: 568.

Q Is it true that ASCAP has never offered any form of license to broadcasters or networks other than a blanket or per program license?

A Never is a long time but I don't recall anything other than a blanket or per program.

Q If it had happened, Mr. Finkelstein, would you be likely to recall it?

A Well, I wasn't--you know ASCAP goes back to 1914 and broadcasting goes back to 1922.

Q Within your tenure.

A I got out of law school in 1927.

Q Within your tenure, of course.

A I don't recall. I told you I don't recall.

Q Has there ever been an occasion in a consent de - cree, rate-making proceeding, in which the Court has ever actually determined a fee for a broadcaster?

MR. TOPKIS: Your Honor, what has happened in the court proceedings is of course a matter of record in this court.

MR. HRUSKA: Naturally.

MR. TOPKIS: I don't see --

THE COURT: My understanding, and I can be corrected if anybody disagrees with me, is that it is correct that Judge Ryan has never actually made a determination independently, although he has I know on a number of occasions dignified the agreements finally come to by the parties by so ordering them.

MR. TOPKIS: And approving them.

THE COURT: And approving them.

In any event, I agree with Mr. Topkis. I don't think we need to question this witness about it.

MR. HRUSKA: Simply to have some clear statement on this record to that effect. I think it is now

clear.

THE COURT: All right.

Q That would apply also to any user, not simply limited to broadcasters, isn't that true?

A I would say that is a great tribute to counsel on both sides.

THE COURT: It may be a great tribute to the judge.

THE WITNESS: And to the judge.

I must say that I think on both sides --

THE COURT: I think it also has something to do with the laws of human nature.

Q Am I correct in assuming, Mr. Finkelstein, that under the rules and regulations which apply to the ASCAP organization --

THE COURT: You mean their own rules?

MR. HRUSKA: Yes, your Honor.

Q -- that ASCAP writer-members are not permitted if they want to remain ASCAP writer-members to license any number of their songs through another licensing organization, including BMI?

A Well, as the consent decree provides -- we are going to call that the amended final judgment --

MR. HRUSKA: Off the record for a moment, your

Honor.

(Discussion off the record.)

THE COURT: The question is whether writer-members are free to license through other organizations.

A The amended final judgment provides that they reserve the right to license users directly and users are defined as anyone who is entitled to a license from ASCAP.

That would include of course --

THE COURT: But the practical effect of all that is that the writers can license directly but they cannot license through another organization?

THE WITNESS: That is correct, your Honor.

THE COURT: All right.

Q Why don't you permit ASCAP writers to license a portion of their works through BMI?

MR. TOPKIS: Objection, your Honor. The amended final judgment was worked out between counsel for the government and counsel for ASCAP.

THE COURT: As I understand the operations of the amended final judgment, there would not necessarily be anything contained in it which would prevent ASCAP from giving its writer-members a wider right than they presently enjoy.

I think the question is objectionable for other

reasons. I don't think Mr. Finkelstein is authorized to speak for ASCAP, to say why it does not do or do certain things, with all of his experience.

If there's been some official action taken by the organization in that regard which eliminates this position, I would be willing to know about it.

Q Do you have any basis for believing that there are reasons for members of ASCAP not being able to license a portion of their works through BMI?

A Yes.

Q Are there any reasons apart from any language contained in the amended final judgment?

A Well, after all, you have several choices. One of the choices that I offered was let every writer for the first five years of his exercise of the writing profession, starting from the time of the first performance of a song, decide whether that song goes into ASCAP or BMI.

THE COURT: You say you offered, Mr.Finkelstein. What do you mean?

THE WITNESS: I offered that in a conference with the Department of Justice, I on one side and Mr. Kaye representing BMI on the other.

I said it was unfair, as I viewed it, to force a writer when he starts out to make a commitment either to

ASCAP or BMI.

I thought that for the first five years the composition in effect ought to be member's and then by that time, after five years, he knows-- he has had enough experience and he knows what the benefits of one are against the other.

Mr. Kaye, representing BMI, turned that down.

Now, you can't operate -- you can't go into the licensing field, you can't license everything that your members write or publish. If all of a sudden you find that you have a great writer and you represent, you know -- ASCAP has so and so on a rate proceeding -- now, some of their works are not going to be in ASCAP at all, they are going to be over in the broadcaster's organization.

As I view it, the broadcaster's organization, BMI, all that is used to beat down rates when we are in a proceeding to determine reasonable rates.

Now, I felt the same thing ought to be true on the publisher's side, but the Department of Justice took the position that a corporate entity is a separate outfit and there is no way of saying that-- you can't divide a writer into two pieces legally. He is one or the other. You don't separate corporations, one in ASCAP, the other BMI.

Then the writers will affiliate with one or the other.

We made some progress as time goes on, on that. We learn as we go along.

At the present time if an ASCAP writer writes with a BMI writer-- if BMI disclaims the work, we will pay the BMI writer even though he is not in ASCAP.

So he has the same benefits as if he were in ASCAP.

If BMI doesn't disclaim the work, ASCAP will pay the writer, you know, a half share, whatever it is, and just claim half -- in effect, half the work.

It doesn't work out just that way.

So that we do try to make these accommodations and have it work out as well as it can.

In the very beginning BMI would call one of our writers in, they did it with Green and Revel, and they gave him a lot of money-- gave them a lot of money, set them up in a publishing business and had them sign licenses, mimeographed to all broadcasters.

Now, that was the individual member granting the license, granting the license directly to the broadcaster, of course arranged by BMI. So they found a way of getting around it.

We thought that-- we couldn't see our way clear to having a member of ASCAP -- a writer, publisher organization, and at the same time over in BMI where they make

separate deals-- in ASCAP every member was treated on the same basis.

Those are considerations that went into working out this provision.

Q You used the phrase "beat down the rates" in that last answer.

A I did, yes.

Q Could you explain what you meant by that phrase?

A Well, in every rate proceeding that we have -- all you have to do is to go to the records of this court -- the broadcasters -- they have an all-industry committee negotiating for the broadcasters.

Q You mean the stations?

A For the stations, yes. The networks used to negotiate collectively at my invitation so that there would not be any antitrust problems, but in the last thing it was different.

You will find that the broadcasters- if you look at the affidavits, they say the rates ought to go down because the ASCAP share of performance has diminished by so and so and so and so and the rates did go down.

BMI will say when they sit down with the broadcasters, we want more money because our performances have gone up.

I won't get into that further unless you have some

questions to ask me about it.

That's what you will find. That's what I meant bout beating down the price.

I don't think that when those performances move to BMI that the rates go up anywhere near to the same extent as the request for the rates going down is made by broadcasters because the performances moved out of ASCAP over to BMI.

Q It's been established on this record that ASCAP key punches in its computer process all data, relevant data, concerning uses of BMI music on networks and surveyed stations, including data on uses by the networks and the stations of BMI music.

MR. TOPKIS: Objection, your Honor.

MR. HRUSKA: I haven't asked the question yet.

MR. TOPKIS: I'm sorry.

Q Do you know why ASCAP feeds into its data processing equipment such information regarding uses of BMI music?

MR. TOPKIS: Objection, your Honor, as outside the scope of the direct and so far as I can perceive, utterly irrelevant.

MR. HRUSKA: The relevancy --

THE COURT: Certainly outside the scope of direct. The relevance?

MR. HRUSKA: The relevance is, your Honor, in connection with the Section 2 aspects of the lawsuit.

I'm about to go into, and I think fairly briefly--

THE COURT: Attempt to monopolize?

MR. HRUSKA: Yes, your Honor.

THE COURT: All right.

If Mr. Finkelstein can answer the question, I will allow him to.

MR. TOPKIS: May we have the preliminary question as a factual predicate, does ASCAP keypunch BMI or does it keypunch non-ASCAP --

MR. HRUSKA: I don't think there's any question in the record, your Honor, that ASCAP does, in fact, keypunch information on broadcasters' uses of BMI music.

THE COURT: You mean indicating it as BMI music?

MR. HRUSKA: Yes.

THE COURT: I don't recall frankly. I don't know where it is in the record.

Are you aware of this, Mr. Finkelstein?

THE WITNESS: I thought I was aware of the contrary, that it is ASCAP or non-ASCAP.

If you have a given composition, you can tell whether it is ASCAP, BMI, SESAC or public domain, but there is no separate cataloging. You have to know the composition.

You have to know these facts independently of the machines.

That's not tabulated so far as I know on the machines.

Q Let me back up a little, Mr. Finkelstein.

Are you aware that ASCAP has published advertisements and put out other materials indicating to writers of music who are not members of ASCAP the ability on ASCAP's part to demonstrate to these people, particularly members of BMI, how much money they would have made on their performances during past periods of time had they been members of ASCAP rather than BMI?

A Yes, that was done rather belatedly. It should have been done much earlier.

Q Do you know whether or not ASCAP could make such a demonstration to those writers unless it had in its computer system all necessary data regarding the uses of those writers' compositions on stations and networks?

A Your question had another assumption in it --

Q Could you please just answer this question?

A I'm sorry, I can't respond.

THE COURT: Am I to understand that your implied answer, which I would like to make explicit, is you do have the information necessary to give these writers if they come

to you in response to your ad, but you don't need to have the information specifically in your computers as to whether their music was licensed through BMI or not?

THE WITNESS: I think the answer is yes, your Honor, we don't -- or stated affirmatively, we couldn't run through our -- we couldn't make a run on our machines, what is there on the BMI repertory. It is not keyed for that, no occasion for it.

If you feed into the computer the question of what were the performances of compositions of A, B, C, D, and E, the computer could tell you what the performances are.

Q And also tell you who the composers of those compositions are, of each of those compositions?

A I don't know about that. I don't know whether it would. If it is an ASCAP member, yes. If it is somebody-- I can't tell you that. We are not too fussy about - -you can do it by the title and the publisher.

Q How else could you tell a non-ASCAP writer who walked into your office at One Lincoln Plaza what his distributions would have been over a past period of time had he been an ASCAP member?

MR. TOPKIS: Objection, your Honor.

THE COURT: Mr. Hruska, I will sustain the objection because it seems to me that you have gotten the

concession, if that is the word to use, the admission from Mr. Finkelstein of the efforts of ASCAP to attract new members and the statement that you put --

MR. HRUSKA: Yes, your Honor.

Q Why do you do that?

MR. TOPKIS: Why does --

Q Why do you attempt to influence writers who are members of BMI to become members of ASCAP?

MR. TOPKIS: I don't believe Mr.Finkelstein as general counsel of ASCAP is authorized to answer that question.

MR. HRUSKA: I think he knows the answer to that question. I think that really is the pertinency --

MR. TOPKIS: I will withdraw my objection.

THE COURT: I will allow him to answer it anyway. I know the answer to it, I think.

MR. HRUSKA: We all do, your Honor.

I would like to get it on the record.

A Let me say initially ASCAP didn't do that at all. ASCAP just sat in its ivory tower and let BMI go out and scour the countryside. Every time there was somebody who looked like he was going to have something, BMI latched onto him, gave him an advance, told him not to join ASCAP, and finally somebody said, Look, we have to straighten out the

record, we have to tell the people what the facts really are and they started a series of ads to do just that thing, terribly overdue.

Our contracts with the broadcasters were about to--- with the telecasters were about to expire and BMI made a big raid on our writers of background music. So that in the rate proceeding the broadcasters could say, Don't look at all these performances, look at these big writers, they are over in BMI.

BMI gave them guarantees of $150,000 a year for ten years, whether they lived or not, and one of them did happen to die the very next year.

Those things go on for a while and finally you say, well, this ivory tower business doesn't work. If that game is played on the other side, you better re-examine what you do.

Q What was the ivory tower period, just to put this in time frame?

A It was until relatively recently, I suppose in a sense, depending on how you define ivory tower.

Q It was your word..

A Yes, my word.

Q You mentioned the fact that you awoke as it were--

A Gradually, I must say.

Q -- at the time the telecasters were coming forward.

Was this in the 1961-1962 period? I just want to get a rough idea of the dates.

A Oh, it was before that. It was before that that we should have awakened more than we did, substantially before 1961. I think it was-- my present recollection is that there was quite a raid in 1957. I would have to check that.

I haven't reviewed these things. I'm trying to rely on the given year when it is susceptible of determination.

We could look at a list of the time BMI got 15 or 16 or 17 ASCAP writers of scores for motion pictures, television programs.

Q There is a difference in my mind, Mr. Finkelstein, between attracting a new writer who has not yet joined a licensing organization, the situation you referred to before?

A Yes.

Q And attracting away from BMI a writer who has already joined BMI?

A We weren't doing either, you see. Well, we were trying to attract new writers but we weren't making any campaign of it.

After all, we want ASCAP to be representative of the writers and publishers of America but when you find that there is somebody else in the field that is painting us an outfit that is old and tired and that kind of thing, I'll tell you, you see, the legal department might have handicapped the business end of the Society to some extent.

We were a little bit too cautious about what kind of an attack you launch on BMI and finally, the thing got so critical that if this thing wasn't going to fall apart we just had to do whatever was necessary to get the facts before the songwriting and music publishing world.

Now, as I say, BMI didn't just try to attract new writers. They didn't care anything about the -- writer. They were taking the big ASCAP writer and trying to

attract him, the one that they felt had a lot of performances, and then they had--they would, well, I don't know enough about how they went about doing, attracting writers. I do know they made special deals which ASCAP wasn't making; can't make now, we can't make a special deal.

Q I think this is probably implicit but to make it very clear, do you believe that there is a connection between the importance to ASCAP on the one hand of persuading writer members of BMI to join ASCAP and, on the other hand, the bargaining power of ASCAP vis-a-vis users?

A Well, what's in the repertoire is going to determine the price you get but that isn't the only thing that is involved.

You see, I don't think of ASCAP as anything other than the members of ASCAP, the writers and the publishers. If ASCAP didn't work, it ought to be, in my book, it ought to be dissolved tomorrow. If it doesn't perform a service for its members, then it is a handicap to the members and there is no reason for its existence and if ASCAP doesn't serve the public, I don't think in the long run that it would be successful and I think it should be dissolved.

But I think that for the future of the writers and publishers of America, I think--I think personally--their future lies in an organization that they own and con-

trol. We have learned to live with BMI and there it is and the users are entitled to have their own organization but I think that we should let the writers and publishers know that ASCAP is an organization that they own and that they control and that basically tries to look out after their genuine interests.

Q I would like to show you a document in evidence as PX 820.

THE COURT: What is it, please?

MR. HRUSKA: It is a letter, a form letter by Stanley Adams, the President of ASCAP, to ASCAP members, dated December 16, 1971. The letter reports on a decision having been made by the ASCAP Board of Directors of December 14, 1971, to award performance credited to ASCAP members when collaborating on new compositions with writers now affiliated with BMI.

Q My question, Mr. Finkelstein, is do you know why this decision was not made considerably earlier than the date on which it was made?

MR. TOPKIS: Objection, your Honor.

THE COURT: I'll sustain the objection.

Q Do you know why this decision was made?

A Yes.

Q Could you tell me?

A Well, the President of ASCAP and I had many discussions about it, trying to serve the interests of writers, basically writers, here, as much as we could and if a writer choses to be in BMI, well, he is still a writer and in the past, we had had a rule that if a work was written by an ASCAP writer with a BMI writer, we would disclaim the work.

You know, we wouldn't pay our member and we wouldn't claim the work and that didn't, in our opinion, you know, after we had some concrete cases before us--it just didn't seem to serve the best interests of writers.

Now, you know, you have a thing like this and you have different opinions and before you get a thing through the Board of Directors, you have to, just like the politicians do, you know, I mean the statesmen who run the nation, you have to try to build up opinion in support of the thing that you want to accomplish and when we got to the point--we had just about gotten to that point when the people mentioned in this letter, at least some of them, Stevie Wonder--I mean he is a name that I recall at the time--they came in and they said, "Look, we--" or their collaborators, their ASCAP collaborators--said, we would like--we are just a national writing team. All right, one is in BMI and the other is in ASCAP and we ought to be able to work that way

and they made quite a case and they persuaded us and we changed the rule and this letter, Exhibit PX 802 for identification, tells us what we did; that we would pay the ASCAP writer, we would--and this was the time we said we would pay the BMI writer, too, if BMI released the work.

Q I don't believe so.

A Well, then, that was done later; we did it in two steps.

Q For how long a period of time, if you recall, was this issue being raised, as to whether or not ASCAP should pay its writers on songs, use of songs, on which they had collaborated with BMI writers.

MR. TOPKIS: Objection, your Honor. The relevance of this is not clear.

MR. HRUSKA: I think the relevance will become clear in perhaps two or three more questions.

THE COURT: Can't you tell us what you are offering to establish.

MR. HRUSKA: Yes, your Honor.

May I ask, then, that Mr. Finkelstein be excused for a moment because if I do that, I think I--

THE COURT: Come up here and tell me.

(Counsel and the Court in discussion at the side bar.)

Q Over what period of time, approximately, Mr. Finkelstein, was this question an issue at ASCAP, the question being, so it is clear in your mind, whether ASCAP should pay ASCAP writers on use of music which they had written in collaboration with BMI writers.

A Oh, it was an issue for quite a long time, I think. There were two groups, one wanted it and the other didn't and finally the group that wanted it persuaded the group that did and this was adopted.

How long, I can't tell you that, but in my own mind, you know, I was an advocate of this for quite some time.

Q Would it be fair to say that it was a period in excess of 10 years?

A Oh, I can't say that. I can't say that--I can't say that any thought was given to it that far back, no.

If you say three or four years, I would say, or two or three years, I would say for about two or three years, I had several talks with the President of ASCAp and he would tell me what the climate was, whether it was something that you could put across and finally, the time came when we could and it was adopted.

You have 24 members of the Board of Directors that you have to persuade?

Q Did you find that any ASCAP writers who were in songwriting teams with BMI writers, had left the ASCAP organization to join BMI?

A I remember one. I just remember one but to me, one was enough.

Q Are you familiar with the fact, Mr. Finkelstein, that when an ASCAP writer member on the Four Fund System leaves the ASCAP organization, that he may lose a portion of income that had been deferred under the provisions of the Four Fund Plan?

A The answer to that is no but I can tell you what the situation is.

Q Well, let me approach it this way:

Are you aware of any claims now being made by former ASCAP members who quit ASCAP and joined BMI, claims regarding their deferred compensation under the Four Fund System?

MR. TOPKIS: Objection, your Honor.

THE COURT: Sustained. I can't find any probity in their claims. I would have to try their claims to find out if they were pertinent.

MR. HRUSKA: I am not offering this for the validity of the claims, your Honor. I am simply offering it on the question that was raised in connection with the examination

of Mr. Marks and to some extent in the examination of Dr. Fischer regarding barriers to--

THE COURT: Well, you can ask Mr. Finkelstein any questions you want about how the system operates and whether he thinks it will provide barriers or not, but whether he knows or not about claims made by other people I consider to be irrelevant.

MR. HRUSKA: I am interested in really getting through this to a point where we can establish some dollars and cents figures and let me go right to that.

Q Are you familiar, do you have any knowledge about any amounts of money that specific writers who have quit ASCAP and joined BMI have lost in deferred compensation as a result of that move?

A Well, the assumption in your question is just incorrect.

THE COURT: What assumption?

THE WITNESS: That they have lost something because of something deferred or whatever it is.

THE COURT: Well, the answer is, to the question that you don't know of any such case, is that correct?

THE WITNESS: Well, that would be a misleading answer, I am afraid, your Honor, because I can explain what the system is.

THE COURT: Why don't you explain to me what happens when a man of long seniority, I guess is who we are

concerned with, leaves ASCAP and goes to BMI and the extent to which his benefits are affected, without characterizing whether it is lost or found or anything else.

THE WITNESS: Yes. Well, this is the -- when someone joins ASCAP, the writer distributions are nine months -- they lag by a period of nine months. Distributions are made out of current -- distribution each quarter is made out of the current receipts that quarter.

The measure of payment is performances that occurred from six to nine months before, possibly more than that, 9 to 12 months before. So that in the member's first royalty check, he is getting paid for performances that occurred nine months before he became a member.

When he leaves the Society, if he takes his works with him, his last payment is the payment out of the money that came in the last quarter of his membership, measured by performances that occurred 9 -- 6 to 9 to 12 months before that.

Now, I think that that is what Mr. Hruska is referring to as a loss on the part of the member because he doesn't get performances out of subsequent receipts from broadcasters that came in after he left but which are paid out on the basis of earlier performances.

So, in ASCAP and I understand this is unlike

BMI, in ASCAP in the first quarter the member gets paid for 9 months before and, then, in the last quarter, he gets the money out of -- he gets his share of the money that came in that quarter but he doesn't share in money that comes in afterward.

Q That was not what I was getting at.

Have you ever had any discussions with a writer member of ASCAP of seniority who was on the four fund system --

THE COURT: I am not interested in discussions. Can't you just ask what the facts are about the system?

MR. HRUSKA: Well, yes, your Honor, what I am trying to do here --

THE COURT: The found fund is nothing but a pension plan, a payment and pension plan, as I understand it.

MR. HRUSKA: The point of this line of inquiry is to establish the belief we have that there are a number of ASCAP writer members who have, within the last several years, joined BMI or who have considered joining BMI and have been told by people at ASCAP that if they did that, they would lose X dollars in deferred compensation, a quantified sum.

THE COURT: If you want to ask Mr. Finkelstein whether he ever told anybody that, ask him.

Q Have you, Mr. Finkelstein?

A No.

Q To your knowledge, has anybody at ASCAP told that to any ASCAP writer in those circumstances?

A Until just now I haven't heard the issue raised.

MR. HRUSKA: Your Honor, if I may consult very briefly with my associates --

THE COURT: All right.

(Pause.)

MR. HRUSKA: We have no further questions on the cross-examination.

THE COURT: All right. Miss Kearse, you never got a chance.

Did you want to question Mr. Finkelstein?

MISS KEARSE: I have no questions, your Honor.

MR. TOPKIS: I jsut want to put one to Mr. Finkelstein, your Honor.

REDIRECT EXAMINATION

BY MR. TOPKIS:

MR. TOPKIS: What I wanted to do is read in just a little bit of supplemantary material to supplement some material that Mr. Hruska read in.

I want to start at Page 206, Line 23, and some of this will duplicate what Mr. Hruska read, but only a little.

Q "Q Is this statement true --"

THE COURT: Who is questioning?

MR. TOPKIS: Mr. Hruska, I believe.

MR. HRUSKA: Yes.

"Q Is this statement true: Quote, the fact is that in the field of performing rights the large user is obliged to deal with all the copyright owners for musical compositions there is a public demand. End of quote.

"A Under normal circumstances, that is correct.

"Q Could you tell me the circumstances in which that statement is incorrect?

"A Well, it was --"

THE COURT: Do you want to read it more slowly both for the reporter and me.

MR. TOPKIS: I beg your pardon.

"Q Could you tell me the circumstances in which that statement is incorrect?

"A Well, it was proved incorrect with respect to the broadcasting industry in the year 1940-1941, as the broadcasters advertised and they had their sponsors along with them. The public just didn't miss the music they weren't getting and there was no demand from the public that there be any change and no hurry on the part of any of the networks to change the situation, and when one of

the networks did change, Mutual Broadcasting System, in May of 1941, the other networks didn't; they weren't bothered at all. They didn't change until the end of October - November, 1941. Mutual's business didn't increase at all so far as I know by putting on ASCAP's music at that time.

"Q If the NBC andABC television networks had blanket licenses from ASCAP, would CTN be obliged to deal with ASCAP?

"A Not as I see it today.

"Q Mr. Finkelstein, could you turn to Page 83 of Plaintiff's Exhibit 15 for identification and look at the first sentence at the last incomplete paragraph on that page.

"A I have looked at it.

"Q That is the statement I read to you a few questions back.

"A That is right.

"Q Could you describe the normal circumstances under which that statement is true?

"A Yes. You know, I thought that statement, that was my thinking at that time and I didn't put in the words normal circumstances. I felt that that was a statement that would apply to all large users when I wrote that.

"Q Including CTN?

"A I didn't have in mind CTN or I didn't -- I just

wasn't separating in my own mind any one kind of large user for another. I was thinking of anybody who makes a wholesale use of music but in the context of the existing situation, what has happened in terms of the kind of license that NBC has applied for and that CBS is applying for, I find that we face a completely different situation than I had in mind back in 1952, was it, when I gave that talk to the Federal Bar Association or that I have had right along until fairly recently.

"I thought that after the networks had their experience in 1940-41 and as a result of it, having kept ASCAP music off the air, had the rates cut in half, I thought that they would act like all other large users and in return for the writers being willing to make their works available to the networks in bulk, in a manner that would satisfy the networks' needs without any unusual or expensive methods of clearing rights, I thought the networks in return would go along with what they assured us back in 1941 when music went on the air, that now we are going to license on the networks terms that they would continue accepting that as a reasonable method of licensing on both sides.

"Now you get into the present period and NBC making its new demand so that it is in a superior bargaining

position as against the individual writer and CBS following along with just a little bit of a change, but having the same objective and if either NBC or CBS is successful, the other networks are going to follow suit because they are going to say, well, we can't afford to spend the kind of money we have to spend if the other networks are being -- are able to save money by what they do. You will find that there will be a repeat of the 1940-1941 situation which I thought was something that could never happen again. I find that I just was mistaken. I didn't foresee what might transpire and that is life, and those things happen with people.

"Q In normal circumstances in which all three national commercial television networks are rollicking along with ASCAP licenses, playing ASCAP music, under those circumstances you feel, do you, that each of those networks is obliged to deal with ASCAP?

"A You know, I did feel that way. I am not sure that I was sound in that approach. As I see more of what is going on now, I become less certain that that is so."

MR. TOPKIS: Now just one other excerpt, your Honor.

"Q Mr. Finkelstein, those were questions put to you and those were answers that you gave?

"A They were.

MR. TOPKIS: Page 294, Line 4.

"Q Do you think that CTN could license directly from the writers or publishers of music written specially for CTN's programs?

"A The question is, is it possible, is that the question?

"Q Yes.

"A Yes, I think it is possible.

"Q Do you believe that CBS could do it?

"A Well, I wouldn't purport to answer for CBS. I know that CBS knows whether it can do it or not.

"Q Is it your judgment that CBS could do it? I said CBS, but I really mean CTW here.

"A CTW here, I don't know what would happen under the circumstances. I just don't know.

"Q Well, let us take a situation in which background and theme music has been written for program X and it has been written especially by an ASCAP member for use in that program. It was created for that program. Now, that composer in creating that music for that program has some sort of contractual relationship with the producer of that program, isn't that true?

"A Well, you are assuming a world now in which there is no ASCAP and I don't know what would take its place

"Q No, no, I am not assuming that here.

"A Well, you might.

"Q I said --

"A I am --

"Q Well then, I would advise you to stop assuming it and to return to today's world.

"A I see.

"Q I just want to know what could happen in today's world whether the producer of program X in his dealings with the fellow he has retained to compose music for that program could license the performing rights of that music for that

program.

"A Yes, subject to whatever forms of agreement exist between the network and writers.

"Q I don't understand your subject. I am sorry.

"A Well, there are writers unions, whatever they provide for. I am not familiar with the agreement, so I can't tell you what it is.

"Q There is no physical obstacle for such licensing, is there?

"A No."

MR. TOPKIS: I will skip a little colloquy. Question at Line 14:

"Q Well, we are going to break obstacles down into various categories until we get an answer to the question.

"A All right.

"Q Is there any legal obstacle to such a transaction?

"A I can't see any."

MR. TOPKIS: I think I will stop right there. YOu were asked those questions and gave those answers?

A I was and I did.

MR. TOPKIS: Just a moment, please, your Honor

(Pause.)

MR. TOPKIS: I have no further questions. Thank you very much, your Honor, and Mr. Finkelstein.

THE COURT: Thank you, Mr. Finkelstein. I hope you have a good trip.

THE WITNESS: Thank you very much.

(Witness excused.)

THE COURT: Rather than start a witness at this time, shall we break for lunch? You will have a witness ready to go at two o'clock?

MR. TOPKIS: Yes, I certainly expect to.

THE COURT: VEry good.

(Luncheon recess.)

2:00 P.M.

THE COURT: Good afternoon everyone. Be seated, please.

MR. BLUMSTEIN: ASCAP calls Mr. Robert Nathan.

MR. HRUSKA: Before Mr. Nathan is put on the stand, your Honor, I would like to raise a point which I think is of considerable experience and has a bearing on Mr. Nathan's testimony. At two minutes to ten this morning we were served with a sheaf of documents by ASCAP, many of which on their face indicate prior preparation.

These are documents which also indicate on the face of the documents are the type into which an economist would ordinarily go. I think it clear that these are documents that Mr. Nathan would be referring to in his testimony.

I have not had a chance to read the documents. I have leafed them through or through most of them. I think that there is a clear violation of the pretrial order. Under the pretrial order substantial grounds, good faith, must be shown as to why there was such a tardy production of these documents to, in this case counsel for plaintiff -- and I think certainly your Honor at minimum we ought to hear whatever explanation there is for the late delivery of these documents before we start getting into them with

Mr. Nathan actually on the stand.

MR. BLUMSTEIN: If I may, your Honor, first of all, the documents themselves consist of certain charts which Mr. Nathan will use toward the end of his testimony. The balance of the documents consist of backup materials for the charts. A lot of the materials are just standard Government sources, certain indexes, consumer prices, matters of that sort. As tothe balance of the material, they concern matters which are official records. They are not going to come as any surprise to anybody. I think I can fairly represent that I don't think I will get to the stage in Mr. Nathan's testimony where I will be using the charts or the backup material until some time tomorrow morning.

THE COURT: Why couldn't they have been delivered earlier? That isn't necessarily going to affect the outcome of Mr. Hruska's comply request.

MR. BLUMSTEIN: Quite frankly, your Honor, the charts were not put into final form and we did not know exactly what backup material we would use until very late inthe day.

MR. HRUSKA: There is material in here, your Honor, which certainly implies the existence of a computer study. That is that the material indicates on its

face that it is based on a computer study which was prepared some time earlier.

Also, your Honor, there are documents in here which indicate that they are based on telephone calls having been made earlier. Part of the material I believe indicates that it was prepared as early as last June. The letter, covering letter, on these documents was dated yesterday and we didn t get it until this morning. I think there is so much in these materials, your Honor, indicating --

THE COURT: What do you suggest?

MR. HRUSKA: I think, your Honor, that all of these documents should be excluded.

THE COURT: For my own education -- if you are right in an analysis of the facts, and I am not taking any position on that, maybe some other form of sanction is in order. I am not going to prevent the Court and the public from getting whatever information may be relevant to the decision in this case. What I will do at the present time is to allow the examination to proceed.

If it gets to a point in which documents are used which Mr. Hruska feels he needs to study in order to be able to proceed with his part of the case, we will just have to take some time to let him do it.

Mr. Hruska, do you have with you or present with you -- it is your responsibility I guess -- you have not been precluded as the result of this from having anybody hear that you would have had present otherwise to listen to Mr. Nathan's testimony.

MR. HRUSKA: I think that is probably true, your Honor. Not having really read the materials, it is difficult to give a categorical answer to that.

THE COURT: We all knew that Mr. Nathan would testify.

MR. HRUSKA: Of course. Mr. Nathan has been noticed as a witness since last April.

THE COURT: Yes.

MR. HRUSKA: The difficulty is, your Honor, that I think that really understanding these materials and going back into the data and checking other sources to enable us to cross-examine Mr. Nathan on these materials is going to take some period of time.

THE COURT: We may have to do something if that problem becomes real.

MR. HRUSKA: Right.

THE COURT: All right, Mr. Nathan, come on up, will you please.

ROBERT R. NATHAN, called as a witness on behalf of ASCAP, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BLUMSTEIN:

Q Mr. Nathan, according to Who's Who in America you are an economist, is that correct?

A That is correct.

Q And it is my understanding that last Saturday, December 1, was a date of some significance in your life, is that true?

A Yes, it's true.

Q Could you tell us why?

A Well, I entered on my Medicare availability the first of the month when I became 65. Saturday I became eligible.

Q Now that we know how old you are, can you tell us how long you have been practicing your profession?

A I have been practicing as a private consulting economist for approximately 28 years, but prior thereto in Government and at University I was engaged also as an economist in research and analysis, altogether something between 40 and 45 years.

Q Could you tell us about your educational background, please?

A Yes. I studied economics at the Wharton School of the University of Pennsylvania where I received my bachelor of sciences degree in 1931 and remained on the staff of the Industrial Research Department, University, and took a Masters of Science in Economics in 1933 and then proceeded into study law and received a law degree from Georgetown University in 1938.

Q Have you received any honorary degrees?

A Yes, I was granted a honorary Doctor of Laws Degree by Georgetown University in 1972.

Q Mr. Nathan, have you prepared a brief resume setting forth your educational background and your subsequent experience from the time that you got out of law school?

A Yes, I have.

Q Let me show it to you.

MR. BLUMSTEIN: I ask that the clerk mark it for identification, please.

xx (AX 317 marked for identification.)

Q Is this the resume you prepared?

A Yes, this is the resume of my background.

MR. BLUMSTEIN: I would like to offer it in evidence, your Honor.

THE COURT: No objection, I take it.

MR. HRUSKA: No objection.

THE COURT: Received.

xx (AX 317 for identification received in evidence.)

Q Mr. Nathan, during the course of your career have you ever rendered any Government service?

A Yes, I spent a number of years in the Federal Government as well as for the State of Pennsylvania.

Q Would you please generally and briefly in just a few minutes, give us some idea of the extent and nature of your Government experience?

A Yes.

Very briefly after I received my Masters Degree at the University of Pennsylvania I went to Washington in the summer of 1933 and entered employment in the United States Department of Commerce.

Fortunately one of my professors, Dr. Simon Kusnitz, was working in the Department engaged in preparing the first official National Income Estimates the United States Government had ever undertaken.

I was asked to work with Dr. Kusnitz on that first study which was completed in early 1934. I left the Government--the Department in the summer of 1934 and worked for the State Emergency Relief Board, Pennsylvania, briefly and also with the President's Committee on Economic Security which was the committee that set up the Social Security Law.

I was a consultant on that committee on unemployment statistics serving as a basis for actuarial analysis of unemployment compensation.

I returned to the Government in the beginning of 1935 and became chief of the National Income Section that year and the next year as head of the National Income Division.

I remained there until the defense agencies were organized in 1940 and moved over with the Defense Advisory Commission and later became chairman of the Planning Committee of the War Production Board.

That was in 1942. And then near the end of the war I served as Deputy Director of the Office of War

Mobilization and Reconversion.

Q What did you do after the war?

A After the war I--I was in the Army a short time and then I went--I undertook an economic survey of Palestine, studied economic potentials of the country and came back as Deputy of the War Mobilization, as I indicated, and left the Government in January--on January 1, 1946 and organized my own firm which has been in existence since then.

Q That is Robert R. Nathan Associates, is that correct?

A Yes.

Q That firm has been in continuous existance since 1946.

A That's correct.

Q Could you tell me approximately how large the firm is today?

A Our employment varies somewhat from time to time, but today we have about 70 to 75 full time employees of whom about 40 are professional economists. We have no engineers, all economists.

Q Mr. Nathan, according to Who's Who, over the years you have been a consultant to a fair number of foreign governments. Would it take less time to list the countries

for which you have been a consultant or those for which you have not been a consultant?

A Well, excluding the large number of new countries organized in very recent years and joined the U. N. I suspect that over the years we have worked for or in more countries than we have not worked in or for.

Q Again very briefly and in general terms, could you give us some description of the kind of consulting work you have done?

A Our firm, and I usually travel to these countries myself, has engaged in a wide range of work ranging all the way from the broadest kind of overall national planning, five year plans, annual budgeting and the like, where we appraised the resources of these countries.

We analyzed and evaluated the past developments, we tend to interpret as best we can the current problems and prospection and then project in the future, and from that we moove to the development of positive operational policies in terms of acelerating economic development, tax policy, monetary policy, the development of agricultural banks, industrial banks, foreign trade potentials and how to achieve them, the setting up of incentives for business and the like.

That's one range. The other range we go down to work for sectors.

For instance, we are now doing a transportation planning job in Nigeria. We also have a team in Taiwan engaged in the multi-modal, analysis of transportation and working roads, water, air and the like. We also do regional studies.

We have just finished the regional project in one of the areas of Malaysia. This was the second one. We are starting one in Korea again. Then we also do specific industry studies, the structure of industry, the inputs and how one can effect and shape those inputs together to get the optimum output, agriculture, and things of that nature.

Q Now, I take it over the years you have also been active in the domestic area?

A Yes. Our work is somewhat, modestly, but somewhat more than half is in the domestic area.

Q And again, generally and briefly, what kind of work have you done in the domestic area?

A That ranges rather extensively from Federal Government work, where the firm has served to undertake a number of extensive studies.

Just very briefly, I will give a couple of examples. We have just closed our third study for the Corps of Engineers on deep water ports, the problem of how we handle three, four, five hundred thousand ton vessels in the United States, for which we have no capacity now--the economic problems, the institutional problems, the systems approach to how this can be solved.

We have done a considerable amount of work for the National Institute of Health and HEW, Health, Education and Welfare, on the whole economic aspects of delivery and pricing of medical services but we have done a considerable amount of work for state and local government and then we have clients, private clients in an extensive degree.

Q Do you serve as the Director of any corporations?

A Yes. I am a director of a bank in the District

of Columbia, I am a director of two manufacturing companies and I am a director of two service companies.

Q I think you put them on the list?

A Yes, they are listed there.

Q We will talk about the past for a moment.

In 1941, according to Who's Who, the Junior Chamber of Commerce selected you as one of the 10 outstanding young men in the United States?

A Yes, I was so honored in 1940.

Q And in the years 1957 through 1959 I understand that you served as National Chairman of the Americans for Democratic Action, is that correct?

A That's correct.

Q Now, in terms of your membership in professional societies are they all listed on AX 317?

A I believe they are all there, yes, sir.

Q In all of the years have you done any writing?

A Yes. I have written a great many articles, pamphlets, books and many speeches in writing, too, that have been published.

xx (AX 318 marked for identification.)

MR. HRUSKA: May I inquire, your Honor, as to whether there is any particular reason why AX 318, which is a list of Mr. Nathan's writings, was not provided to us until

this morning?

MR. BLUMSTEIN: You never asked for it.

THE COURT: Well, I don't expect much to happen as a result of the list of Mr. Nathan's writings. We will have to discuss these matters.

MR. HRUSKA: I don't either but it is perfectly obvious that if you have a list of a man's writings that you can go through and see if there is anything in those writings that might be used on cross examination, that is a more effective, desirable way of doing it from the standpoint of the opposing party than if you don't have such a list.

Now, I believe that they knew that they were going to be putting in such a list as far back as last April.

THE COURT: Well, supposing we strike the list.

MR. HRUSKA: I don't want to but I think there ought to be some explanation in this court for dumping these documents on us this morning.

THE COURT: I think we should have such a discussion in the robing room at the break, and we will.

Proceed.

Q Mr. Nathan, would you tell us whether over the years you have had any particular experience in the broadcasting field, the entertainment field or any related fields?

A Yes, I have.

Q Would you give us some idea of the nature of the work you have done in those areas?

A Well, the first experience in this field from the economic point of view was about 20 years ago when I was approached by the Theatre Guild to consider undertaking an economic analysis of the legitimate theatre and what the developments were, cost prospects, future prospects.

There was considerable concern about the legitimate theatre and we were paid for preparing a prospectus, an outline, detailed outline a proposed study and I met with members of the Theatre Guild and I think it was with the Executive Committe and we discussed this.

The project never went ahead but that afforded me an opportunity to look in the economic picture there.

More recently, in the field of television, we were, the firm was employed and I worked directly on it, by Group W, the Westinghouse Broadcasting Company, analyzing the economics of multi-station ownership in relation to the character of the owning company.

The FCC was interested in the possible diverse implications of non-media ownership of television stations and since we all know Westinghouse is the producer of home appliance and other products, it is clear this was not basically a media company and we prepared an extensive report

which then became part of the record at the FCC.

Around that time or soon thereafter, we undertook a comprehensive study of the economic and social value of television and that had to do with a controversy concerning the allocation of television channels as between the over-the-air television and the land mobile utilization, namely, the oil companies which would have--or the taxicab companies where they used communications between a central place and the mobile units, and this involved a careful study of what the values of television were and we did simulation analysis in terms of trying to indicate what the contribution to the economy was of television broadcasting, what the investment was and the like.

More recent than that, I was employed, I became personally involved again by Warner Communications with respect to the proposed merger between Warner Cable TV and Cypress Cable TV and in that undertaking, a careful study was made of cable television, what it was like, what it was doing, what the economic aspects were--considerable confusion, I must say, economically, then, with respect to that subject as I am fearful there still is--and I appeared in a discussion with the Justice Department, the Anti-Trust Division, concerning that subject and then that was the end of it.

The merger proceeded and it was consummated.

Then I was employed by Cox Cable TV concerning a merger between Cox and the American Television Corporation and in the middle of that analysis, before our report was concluded, they dropped the merger because of the opposition of the Justice Department.

Most recently I testified before the Federal Communications Commission briefly in an oral hearing on the subject of the prime time access rule and that was just two or three months ago, concerning the continuation--I was in favor of the continuation of the rule which limited the number of hours the networks would have of the prime time programming in the local stations or the affiliates.

Then, just a few days ago, I testified on behalf of the National Association of Broadcasters before the Federal Communications Commission on the subject of anti-syphoning, the anti-syphoning rule and that was a couple of weeks ago.

Q What are the anti-syphoning rules?

A The anti-syphoning rules have to do with the access of cable TV to the over the air programs of broadcast television. Most of the programming of cable TV reflects retransmission of what comes over the air on over the air broadcasting but there has been a running conflict between

the cable and the over the air broadcasting as to what the cable can do and there have been three issues--one has to do with the distant signals and the FCC has limited the access of cable television to bring in distant signals, but this particular hearing focused more sharply on sports and on movies and there are rules set by the FCC which limit the degree to which cable television can have access to sports and to movies that are less than two years old, on the air more than 10 and the FCC is considering changing those rules and one of the major concerns has to do with the shift of programs that are now available "free" to the viewer that might then become a paid program under cable TV pay television and this was the whole thrust of this hearing.

Q Have you ever been retained by the National Music Publishers Association?

A Yes. I forgot to mention that.

I have served, personally, in a consulting capacity to the National Association of Music Publishers for about eight years or perhaps nine years now, almost entirely in relation to the copyright law revision.

I testified before the House, a House Committee twice and before a Senate committee concerning the revision of the two cent ceiling royalty rate that was enacted in the copyright laws in 1909 and it remained on the books

ever since and as a result of that testimony the House--not just the committee--the House enacted a revision to raise that rate but the Senate has been sort of involved in this now for about four years and no final conclusion has been arrived at.

Q That two cent rate of course refers to mechanical licenses, is that correct?

A That is correct. That has to do with the mechanical -- there is compulsory licensing of mechanical reproduction of music and the two cent rate is a ceiling rate with respect to anybody having access to music for mechanical reproduction.

Q Let me ask you this, Mr. Nathan:

Apart from the work you may have done in connection with this lawsuit, have you been consulted or been retained by ASCAP in any other connection?

A Yes. I have and we have, the firm has and I have myself. It has been approximately a year and a half ago, a little more than that, when I had my first meeting with some of the ASCAP officials and directing personnel concerning problems of ASCAP. One had to do with the then forthcoming negotiations for the -- concerning the rate to be paid by local radio stations to ASCAP for performing rights.

Also t athat first meeting there was a discussion of this case that is before the Court here at the present time and then , during the recurring contacts that have taken place over the last year and a half, there has also been discussion of work concerning the ASCAP survey.

Q Does it contemplate as of January 1, 1964, you may undertake some responsibilities in connection with the ASCAP survey?

A As of the present time, it is the intention of ASCAP as I understand it, and for us, to accept this assignment to undertake the consulting and advisory service on the ASCAP survey, to start January 1.

Q Is it your understanding that you will, in general terms, be doing the sort of work heretofore done by Joel DeanAssociates?

A Yes, that is my understanding.

Q In connection with the local radio negotiations which you mentioned before, did you ever actually sit in on any negotiating sessions between representatives of ASCAP and representatives of local radio stations?

A Yes, I did sit in on the sizeable session that largely resulted in a settlement of that issue about over a year ago.

Q In connection with your work on this case, could you tell us what you have read andwhom you have spoken to?

A Well, in preparation for this case, I have read the transcription personally, I am saying now, the transcription of all of the witnesses up to Mr. Finkelstein, yesterday, that appeared -- I think I did get through Aaron

Copland's testimony, but other than that, other than Herman Finkelstein, I went through all the transcript myself of the ASCAP witnesses.

I was present in this courtroom, in the courtroom when Dr. Fisher testified and I was --

THE COURT: Excuse me. I wasn't clear whether you said you read the transcripts just of the ASCAP witnesses' testimony or all the witnesses.

THE WITNESS: No. Just of the ASCAP witnesses' testimony, sir.

Then I was in the courtroom during the testimony of Dr. Fisher and most of the time of Mr. Sipes and I also read the transcript of Dr. Fisher and I read the transcript of Mr. Sipes, but one of my senior associates, your Honor, who had worked with me from the beginning on this case did read all of the transcript of the CTN or the Columbia witnesses and also read all the depositions.

THE COURT: He has my sympathy.

Q I think that was responsive only to half of my question. I asked you whom you had spoken to?

A I beg your pardon. I spoke to the attorneys for ASCAP extensively over the recent months and week.

From the very beginning, in April of 1971, I had a number of meetings with the ASCAP senior staff members,

seeking to learn as fully as possible what I could about this complex process and organization and function so that I had extensive conversations with the attorneys for ASCAP and with ASCAP officers and directors -- I don't mean directors in the board sense, but heads of departments.

Q I think you said it was 1971 or was it 1972?

A '72. I beg your pardon. It was 1972, April, when the first meeting was held.

Q Let me direct your attention, Mr. Nathan, to the market for the licensing of performance rights as it currently exists in the United States and let me ask you some questions about it.

First of all, would you give me your understanding of the constituent parts of the market, who is in the market, who are the buyers and the sellers and so forth?

A Well, they are, very briefly as I understand it -- I might say there are three categories of constituents in the market -- there are the suppliers. There are the users. And, there are the intermediate channels or vehicles or organizations which help to bring these two together in terms of the performing rights.

The suppliers are principally the writers, composers, those who are engaged in writing the music and

the lyrics.

Then on the supply side there are also the publishers, who take these creative compositions and seek to exploit, promote, make them available, expand the marketing opportunities to the fullest extent, help in a sort of selective process and encouragement of production of the creative in music.

At the other side, the users. Involved herein are mprimarily the television networks, Columbia, NBC and ABC. There are the local television stations around the country, TVHF and UHF stations; the radio broadcasting. In the radio broadcasting, as we all know, the networks play a minor role these days but the local radio stations, numbering over 6000, are a very important factor in use of music.

Then, beyond that, there are those who use piped in music -- users. There are bars, nightclubs, hotels, restaurants, professional offices, commercial and industrial. And this is a quite wide range, the symphonic orchestras, and all the people who use music.

And then of course in between we have primarily ASCAP and BMI with SESAC and I don't know much about it. I understand SESAC is largely in the foreign music performing rights service, but and also, by the way, there are those

whose intermediate role, play intermediate roles in providing synchronization rights, Harry Fox and two other organizations, Williams and Brody, but these, by and large, are the constituents, the components of this performing rights activity.

Q Now that we know that, can you give us your understanding of how the market functions under the present system?

A Well, the market functions primarily or I would say overwhelmingly by the writers associating themselves in ASCAP as a member associate or being affiliated with BMI and through these channels, they make available their music; the BMI and ASCAP engage, then, in the negotiation of the performing rights with the users who I will come to in a moment. These intermediate agencies such as BMI and ASCAP engage in negotiating the rates of payment for the performance rights.

ASCAP, which I know considerable about now, I still have much to learn but I think I know considerably about the nature of its operation, then proceeds to perform three additional functions beyond the negotiating. One has to do with the policing, which is designed to protect its members from pirating or exploitation, utilization of music without payment.

It also engages in monitoring which is part of the survey function, which is designed to provide information as to which music is used by each of the media and then, that, in turn, is the basis whereby the last function, important big function is undertaken -- namely, the distribution of the proceeds that derive from these media less the expenses that are involved which then are distributed to themembers.

Now, the other side, just briefly, of the coin is that the three networks buy themusic, negotiate with ASCAP, report to ASCAP, and there is some review and monitoring there.

But they negotiate individually. Then you have the all industry committee in the radio field. The one I attended was that negotiation and they negotiate their rates for payment of performance rights with ASCAP and I assume the same process with BMI.

And then, the local television stations are formed together also to engage in a kind of a collective negotiation on the payments and I think beyond that it is largely a direct negotiation like with Muzak and the like, and then ASCAP has an extensive monitoring operation to engage in general licensing and check against the abuses of those who use music and don't pay. That's pretty much the way as I see it the system works.

Q From your point of view as an economist, what is the commodity that ASCAP as an organization makes available to users?

A Well, that commodity I prefer to refer to as a service I think rather than a commodity. It is not quite a loaf of bread, a pound of steel, but that service is somewhat undetermined in quantity but obviously a very, very vast large supply in compositions in music which is available.

I have read the testimony here from serious music to the light music to hillbilly to sentimental music, patriotic music, religious music, a range of service, a range of product, which is extremely extensive and the totality of which in short boggles the mind if one would try to do a complete consensus of all the music that is available, very diverse supply of services.

Q Do you happen to know what the size of the ASCAP repertoire is in terms of number of compositions?

A I know it is in the hundreds of thousands. It may be in the millions. I don't know. I have never been-- I have asked the question. I just don't know. I have never learned what the totality might be.

Q All right.

Again from your point of view as an economist,

what is the transaction or the vehicle generally used by which the ASCAP repertoire is made available to the users you have previously discussed?

A The vehicle arrangement by and large is a blanket license, namely, a rendering of a service in the form of making available to the user or in the case of local broadcasting where one is dealing with an organization of users and local television, the making available of this repertoire from ASCAP and similarly from BMI, as I understand it, to this user or users for a given consideration based either on a percentage of business done or gross revenues, however they may define it in their agreement, or a given dollar magnitude.

Then the buyer or the user has the right to use any and all of that repertoire he desires or seeks or needs.

Q From your point of view as an economist and taking into account what you said before about the market and how it functions, do you see any advantages or disadvantages in the use of the blanket license?

A Oh, as an economist I think the blanket license has tremendous advantages.

If one were dealing with a readily classifiable, reasonably homegeneous service or categories of service,

perhaps the complexity that truly attaches to this industry in this activity might not be difficult to cope with, but when we recognize that we are dealing here with a large number of producers of that service and even more complicated is the fact that you are also dealing with a very, very large number of users.

As I remember, in 1972 I know the last figures I saw there were 6400 AM and FM local radio stations across this country, most of whom we know clearly from general knowledge rely very heavily on music.

This extensive geographic diversity and utilization, diverse programming, diverse product, is an extremely complicated one that hardly lends itself to the kind of commercial enterprise one sees in an automobile agency or gasoline station or a department store.

As I observed and analyzed the economic characteristics of this service and of the users, it impresses me that whoever really conceived of and evolved the blanket licenses that now functions deserves a great deal of credit for bringing order and permitting an orderly process in an activity which could be very chaotic and disorganized.

Q Dr. Nathan, is it significant to you from an economic point of view that a user who has a blanket

license may never need orcould never perform every piece of music in the ASCAP repertory?

A No, I don't find that a significant factor.

Q Could you explain that for us a little bit more, please?

A Yes. I would focus on that from this point of view, that here you have this diverse supply of a service. In many aspects, it is unique, it is creative, it is distinctive.

The number of the product is so extensive as to, as I said before, be all-bewildering, and the utilization of that music depends so much on the circumstances.

In Washington I listen to radio stations all the time when I am in a car and sometimes in the morning shaving or at night just before bedtime, and each station has its own choice and its disc jockey uses what he finds most appealing.

Then there's the operas and the serious music and the light and the dance hall, so that, in essence, the diversity of the user associated with a large number makes it totally desirable to make this product available on a choice basis, and the fact that nobody uses these hundreds of thousands and physically couldn't I think in a lifetime if they went rhough every piece of music that had been

created or which is in the repertoires, is meaningless in an economic sense because they have the choice and there are many, many times and many, many things and many, many relationships in our society where individuals buy and they buy a service or a product which they may or may not use and certainly may not use in total form.

So I find this not a significant economic element, the fact that they are paying for access to resources which they may or may not fully use.

Q Would you tell us, sir, your understanding of the manner in which license fees for the blanket license are today arrived at or determined?

MR. HRUSKA: May I have that question read back, your Honor?

THE COURT: Yes. Would you please read it?

(Question read.)

A Well, from my own experience--

MR. HRUSKA: Your Honor, I would like to object to the question. I believe that the manner in which fees are arrived at is a matter of record in the case.

THE COURT: I assume Mr. Blumstein wanted to establish for the record that Mr. Nathan understood it.

MR. BLUMSTEIN: Yes, sir. He also has some experience in that area.

MR. HRUSKA: I think what we are getting into, Mr. Nathan testifying perhaps about examples out of the past of negotiations particularly in areas other than network television licensing --

THE COURT: I didn't understand that to be the thrust of the question.

In any event, it is TV licensing for the moment. Whether it is implied in your question, I don't know.

MR. BLUMSTEIN: I wasn't limiting it to network TV. I was limiting it to broadcasters.

THE COURT: Let me hear it, Mr. Hruska. It is not going to corrupt me.

A It is my understanding that these rates are arrived at through negotiation, that the parties get together and as in all negotiations, whether it concerns a price or concerns a wage or it concerns an arrangement between economic entities, there is a bargaining, and this is the common pattern as I observed and studied and read it.

This is the common pattern of setting performing rights fees under the blanket system.

Q You have testified that you participated in one such negotiation.

A That is correct. I participated in that and undertook to prepare and submit data in that negotiation.

Q What is your understanding of what happens if the parties are unable to agree upon a fee?

A If the parties are unable to agree upon a fee, there is a provision in the Order of the Court providing for consent arrangement, providing for the referral to the federal judge who will then hear from the parties, and the burden of proof is on ASCAP to demonstrate that the fee which it is requesting is reasonable.

And the judge has the right then to set the fee.

Q Do you know if the judge has ever set a final fee in one of these proceedings?

A The judge has never set a final fee in any such proceedings.

Q Again, from your prior testimony and your experience, your understanding as an economist, would yougive us your views as to whether the license fees for the blanket license are divorced from the question of usage of music under that license?

THE COURT: Are divorced?

MR. BLUMSTEIN: Yes.

MR. HRUSKA: I'm sorry, I didn't catch it.

THE COURT: You want the question read?

MR. HRUSKA: I would like the question read back?

(Question read.)

A My judgment and what I have observed and participated, the usage of music is definitely one of the factors involved in the negotiations, and in the radio all-industry committee negotiations the-

MR. HRUSKA: Your Honor, I rise to object in the middle of the answer becuase I don't think that the question really specifically called for information as to negotiations in the radio industry and I don't think that such information is relevant to this case.

THE COURT: I will sustain that objection.

You can continue with your answer about the degree to which usage of music is a factor in determining the price.

A It is my understanding, and it is again from reading in this case and discussing with officials of ASCAP and the attorneys and observing the changes in thepast in the rates, that music is a very-- uses a very clear factor.

As an economist, I can't imagine, your Honor, that two bargainers would get together and talk about a fee for the next three years or five years without considering what happened in terms of the past and at the time of lthe negotiation what was in prospect.

I read a -- I can't identify it, I'm sorry. I read

a proceeding before Judge Ryan where the discussion of the fee prior to the setting of the interim fee concerned itself very considerably with what theuses were and what the trend of uses were.

As I recall, the television network was wanting an hour rate because they were experiencing a declining use of music which is perfectly logical.

Q Mr. Nathan, have you read the amended final judgment in United States v. ASCAP?

A Yes, I have.

Q I direct your attention to some of the provisions of that document and ask you for your views as to their economic significance in the market that we have just been describing.

A Yes, sir.

Q First of all, are you acquainted with the requirements that a publisher or writer must meet in order to become an ASCAP member?

A Yes, I am familiar with that.

ASCAP membership is open to any writer who has had one composition or one work published through a regular publishing channel and then his absolute right of entry in ASCAP is enjoined from restraining that entry.

As far as publishers are concerned, every publisher

who has been engaged in publishing of music for a year or more is eligible for membership in ASCAP and, again, as I read this judgment, this is a compulsory condition for ASCAP and not a choice.

Q What is the economic significance of those requirements?

A I think it has very great economic significance because of all the elements in the economy, freedom of entry is one of the most important.

Since ASCAP assures freedom of entry of writers and composers who meet this minimum requirement and publishers, I would say this is clearly consistent with one of the fundamental precepts of the competitive system.

Q Are you acquainted with the provisions of the amended final judgment concerning the grant of rights that ASCAP gets from a publisher or writer member?

A Yes, I am.

Q What kind of rights does ASCAP obtain?

A It is a non-exclusive right. ASCAP does not get exclusive right. ASCAP is enjoined and restrained from receiving exclusive rights.

Q In your judgment, what is the economic significance of that particular provision of the decree?

A This again is a very important element in our

competitive system, meaning that no organization, in this instance, ASCAP, can engage in preventing anyone of its members from licensing of its music to a user.

Q Are you aware of the provisions of the decree which tell you what happens when a user requests a license of ASCAP?

A ASCAP cannot deny that user access to the ASCAP repertoire. Of course, there has to be a fee arranged.

If somebody says: I want it for nothing, of course they can be refused.

Then there has to be negotiation of the price.

As I pointed out before, if the parties don't agree, can't agree, then it is put up to the judge to undertake a determination of a reasonable fee.

Q Since we are talking about the procedures for fixing a fee in the event the parties are unable to agree and you have just described them, can you give me your opinion, your judgment as to what economic significance those provisions are?

THE COURT: Provisions for fixing a fee?

MR. BLUMSTEIN: Yes.

MR. HRUSKA: Your Honor, I did not object to the prior line of questioning regarding other provisions of the consent decree because they were background .

Now we are on something that I think we are a little closer to home.

I believe that the question should not be as vague and open-ended as the economic significance of Paragraph 9 of the consent decree.

If there is some particular --

THE COURT: I don't think that Mr. Blumstein put it that way. I took the import of his question, what is the economic significance of the requirement of the decree if ASCAP can't reach an agreement with the parties they are negotiating with, then the Court has the power to set the fee.

MR. BLUMSTEIN: That is correct, your Honor.

MR. HRUSKA: I mean, that is the heart of Section 9. That is what Section 9 of the decree says.

THE COURT: I don't quite understand how you can break up that proposition. We want to know what Mr. Nathan thinks of the economic significance --I don't care what you call it, syndrome --

Q What role does it play in the functioning of the market?

A It clearly precludes or prevents or estops ASCAP from setting a fee capriciously or arbitrarily or unrealistically or one that would put it into a position of making

a determination unilaterally that would not make the music available to others because clearly if the other side feels that there is not bargaining, they always had the access to the Court.

On the other side of the coin, I think the very fact that you have what amounts to a compulsory arbitration provision by going to the Court often tends to stimulate the parties to arrive at a settlement.

Q Let me ask you this: We know that the Court, of course, has never fixed a final fee in any proceeding brought under the decree.

Would you give us your judgment as an economist whether the Court, if such a determination were requested of it, could set a fee which would be the econic equivalent of the sum of direct licensing transaction between ASCAP members and the users that might take place outside of ASCAP?

MR. HRUSKA: Excuse me.

Your Honor, a point of clarification.

Did you say users or user?

MR. BLUMSTEIN: Either one.

MR. HRUSKA: I would --

MR. BLUMSTEIN: Would you prefer user?

MR. HRUSKA: Yes.

THE COURT: Would youread back the question so I am primed for the answer?

(Question read.)

A I don't believe as an economist the Court could set such a fee structure.

If I understand the assumptions, the implication here is that there will be direct licensing by Columbia Television Network, for example, with the writers and with the publishers, through the publishers. And since there has been practically no direct licensing or insignificant amounts, I find it hard to believe that the Court would be in a position with all of the expert witnesses who might be available, to arrive at a set of rates by some categories which would simulate what the market place would result in if these determinations were made in the market place.

Q Is it your judgment, as an economist, that the Court in that kind of a proceeding should seek to determine the economic equivalent of what might take place in direct licensing transactions?

A No doubt about it. If you are going to go from a blanket license to a direct licensing, and the contention made on behalf of that change is to get the benefit of competition, price competition, the functioning of the free market, it seems to me it would be totally proper to

expect that the Court would then seek to arrive at those rates in reconciling the differences between these two parties which would reflect that objective,namely, the market place.

Q Let's go back to the decree for a moment.

Are you aware of the provisions of the decree which relate to the ASCAP survey and distribution system?

A Yes, I am.

Q Could you give us your views as to the economic significance of these provisions as they affect the functioning of the market today?

A Well, yes, I would be glad to.

Those provisions concern the role of ASCAP as a membership society negotiating for those members, and then undertaking this survey to reward or compensate these members for the service they have rendered.

The provisions that have been set forward provide in considerable detail how the various performances shall be weighted, what kind of credit shall be given for different kinds of music and the methods of compensation which assures a degree of equity and fairness in the membership of ASCAP, one in relation to the other.

This is a perfectly reasonable, fair and I think sound economic approach to an organization of that nature

arranging for compensation to its individual members.

By the way, I just add that in that clearly the performances, number of performances become one of the major factors in determining that distribution pattern.

Q Mr. Nathan, do you as an economist see any similarities of distinctions between ASCAP and other kinds of collective bargaining groups, let's say like a labor union?

A Well, yes --

MR. HRUSKA: I object, your Honor. I think the question calls for an answer which when given will be irrelevant to this case.

THE COURT: Overruled.

A I think that ASCAP does bear as a voluntary organization similarity to trade unions in that the organization does bargain for its members, butbeyond that it is quite different.

It needn't be certified in a sense. It has the provision of wide open membership--

THE COURT: It is subject to the antitrust laws.

THE WITNESS: That is correct, sir.

A Under these consent arrangements the openness is assured and practically met. I t does engage in handling the proceeds which unions do not, either of wages or of fringe

benefits, and except for piece rates really in some industries, there isn't this kind of arrangement for benefits in relation to productivity of the individual, but it is mainly in the bargaining respect that it is parallel or similar to unions, but not otherwise.

THE COURT: I am going to ask some questions that somebody I'm sure is going to think irrelevant. I think they are harmless.

Do you see any similarities between ASCAP in its function of providing music to a public utility now that the decree requires that it must provide all subscribers so to speak with service essentially at a reasonable price and, if so, is there any significance to be attached to that similarity?

THE WITNESS: Your Honor, there is a similarity in the sense of the equality of access by the users to the product and the producers.

On the other hand, your Honor, the public utility really is a monopoly, it is natural monopoly.

You are not going to have two power companies running power lines up and down the street or underground wires in each community.

I remember when I went to school in Philadelphia there were two companies. It was sort of chaotic. I think

we learned from that.

Now we do recognize the natural monopoly characteristic of most public utilities, but except for the required access to the product and freedom of entry, I think, your Honor, the parallel stops especially inpricing.

I have testified on many, many cases on rates returned for telephone companies, power companies.

THE COURT: There is no collective that negotiates for the telephone company.

THE WITNESS: That's right, and besides, sir, the rates on telephone service are just child's play compared to what is involved here with what you have -- you have long distance and local and installation charges and Princes telephones and Touch tone pushbuttons and commercial versus home and the jack and all this business, but if it is a complicated rate structure for the telephone company, it is ridiculously simple compared to what we have here, with this diverse and non-homogeneous services.

Q Mr. Nathan, in your opinion, does the market for the licensing of performance rights that we have been talking about for the last few moments as it exists today function effectively?

A It is my judgment as an economist that this is a highly efficient and highly effective market which very substantially fulfills the objectives of economics in our society -- namely, in encouraging output, providing for an efficient and orderly flow of that output from the supplier to the user and, again, accepting his Honor's supplement about under the decree or arrangement, equity and equality of opportunity are assured among the users and I think that the whole mechanism, the whole system is

a very efficient and a very effective one in handling this complicated matter.

Q You said that the system encourages output. Could you amplify that for us a little bit?

A Well, it encourages output in the sense of the freedome of entry, in that anyone who writes music has an opportunity to find out let's say through membership in ASCAP once they have achieved their first little threshold requirement and that individual is encouraged to try his hand at the commercial side of it, to earn funds, because he knows that if he writes music, and it is used, he is going to be rewarded, he knows that he is going to be rewarded more if it is accepted and used widely than if it is used narrowly and the whole system is one conducive to facilitate those who want to write music to do so, and to receive their just rewards.

Q Let's talk for a few minutes, if we may, about the subject of competition in the present market.

In your view, do ASCAP and BMI compete with each other?

A Yes, I think ASCAP and BMI certainly do compete with each other, both in supply and demand.

Q Can you give us the basis for your conclusion?

A Yes. I have no figures on how much membership

movement there has been or how many members BMI has recruited from new songwriters as compared with ASCAP, but they do seek to attract new writers of music to their ranks.

As a matter of fact, I guess it is not raiding, like in the union situation, but they do seek to attract members one from the other and I don't know what the numbers are, but every witness whose testimony I read had indicated there had been some movement of members in the one case and affiliates on the other, so they do compete for music.

I believe they also compete in the sense of the price that is paid for the music because in the negotiations use is a factor and to the extent that BMI music use is up and ASCAP is down, this becomes a bargaining weapon against ASCAP's rate and in favor of BMI's rate.

Insofar as the individual writers are concerned, they compete with each other in the full sense of the word, in terms of trying to get performance because they are paid in proportion to usage, not one to one -- it depends on the kind of usage -- but they are paid and given the same usage as one whose work is utilized more than the other gets more funds.

The purchaser is rewarded by competing with other publishers. If he can promote his product more effectively

and get it used more widely, he gets half of the performance rights, so that I would characterize it as a vigorous competitive sphere.

THE COURT: Mr. Blumstein, unless the next question is inseparable from the last, I think we will break for the afternoon.

I would like to see counsel in the robing room.

(Recess.)

Q Mr. Nathan, before the break, I think we were talking about the general subject of competition in the present market and we talked about competition between ASCAP and BMI and I think as part of that answer you talked about competition between individual copyright proprietors, that I, the members of the affiliates of ASCAP and BMI and just so that the record is clear, in your judgment do individual copyright proprietors compete against each other?

A Yes. I believe they do.

Q Let me ask you this. As to the licensing of performance rights in the present market as it exists, do copyright proprietors compete against each other on a price basis?

A Not on a price basis. Certainly on an income basis, a result basis.

Q Do you have any judgment or any views as to why this price competition does not take place?

A Yes, I do.

I think in our society, although I certainly agree with most economists that price competition is a very important element and component in the whole competitive process, there are many segments of our society where price is not the major determinant.

I don't think this is my own economic judgment,

that most people go to the doctor because he charges $7 for a home visit whereas the man two doors down the street or a block or two away charges $9 for a visit.

In a great many industries quality is the principal determinant.

I must say, we are an economic consulting firm in the middle of economics in every respect and we very seldom ever compete on a price basis.

If somebody comes to us, say somebody has offered to do a job for $12,000, will you do it for 11, obviously we take a very hard look at it but normally we don't engage in making our arrangements with our clients on a price basis because the inputs vary so much and when one is talking about especially creative talents, the ability varies great here, the product obviously vary greatly, the use vary greatly and I think that the price per unit is by no means an exclusive or essentially principal determinant of competition and as I go back to what I said before, I think this is a highly competitive area. The granting of performance rights is manifested through competition on the supply side and the demand side and the intermediate side and price competition is not an essential ingredient to characterize this as a competitive sphere.

Q I think it was Dr. Fisher who testified in this

case that it was his judgment that competition or price competition was prevented by the actions of a cartell and I take it he was referring to ASCAP and I suppose to BMI.

Are you acquainted with that testimony?

A Yes, I am.

Q Do you agree or disagree with that?

A No, I disagree with it. I think that price competition is not prevented by the cartell. If you call ASCAP that--I don't think that is a proper characterization of ASCAP either but I don't think that the price competition per unit of service or product is prevented by ASCAP any more than it is by BMI which is not a membership organization.

I think that what we have here is a mechanism for negotiating price or rates which is consistent with or compatible with or conducive to an efficient, orderly flow of product in a fair and equitable manner, freely determined by freedom of access, freedom of entity on both sides and, therefore, I do not agree with Dr. Fischer that price competition in this particular commodity per music composition, is precluded by ASCAP as such.

There can be direct licensing and CTN can go to any member and negotiate a price any time they want.

Q Well, then why is it, sir, that in your view

today that price competition does not exist?

A In my judgment it doesn't exist because given all the characteristics of the supply side, the demand side, the negotiation side, it is far more efficient and far more economical and far more conducive to an economic product along with an artistic product, that the process be as it has evolved over the years and it is a very satisfactory and efficient one.

Nobody has sought the direct price in essence. This is the fact.

Q In your view, does ASCAP impose any restraints on the functioning of the market as it exists today?

A I know of no evidence or supported contention that ASCAP so serves.

Q Let me turn to a new subject, something I would like to call direct licensing, Mr. Hruska's phrase is by-pass.

I think you know what we have in mind?

A Yes.

THE COURT: Which are you going to call it just so we get it straight?

MR. BLUMSTEIN: I will call it direct licensing

THE COURT: All right.

Q You know what I mean when I use the phrase direct licensing?

A Yes, sir, I think I do.

THE COURT: Let's all be sure, Mr. Blumstein means the right of the user of music today under the present decree to go to the owner of a copyright and make direct arrangements.

THE WITNESS: That is correct, sir.

Q In your judgment, Mr. Nathan, is direct licensing as we defined it an alternative to the present system for most users of copyrighted music?

A It is an alternative, but I don't think it is a practical alternative to most users of copyright music.

Q Why is that, sir?

A If I may use my illustration of the local radio stations, I come back again to the 6400 plus UHF and VHF radio and broadcasting stations around this country and I think again of their programs and again of the role played, music selections and the use of music in between the commercials.

I guess they prefer to characterize the other way, the commercials in between the music. An awful lot of music is used, quite contrary and I think that direct licensing by local broadcasting stations with the copyright owners music is impracticable and I can not readily envisage a mechanism, a system, a set of instruments which could make this a practicable operation.

Q All right.

Let's talk about the Columbia Television Network.

In your judgment, is direct licensing an alternative to that particular use?

A I believe it is. I think it is quite different from the local radio operation.

Q Would you tell us why you think it is quite different?

A Well, in this instance we are talking about Columbia Television Network, which is a very strong economic force, a large entity, powerful entity. It is part of Columbia Broadcasting Corporation. It has evolved over the years with lots of talent, a lot of ability. I read Mr. Dann's testimony carefully and I think that one can't help but get out of that testimony a sense of strength and great organizing ability and a lot of talent.

When one looks at what the performance rights purchases are by Columbia Television and one sees the capability there, I think this is entirely practical. I would emphasize the two aspects of the demand or the use, namely theme and background on the one hand and the featured music on the other.

The predominance of theme and background and already the context and the writing of that by Columbia and its producers or packagers leads me to conclude that this ought to be a totally practical approach to licensing for CBN of performance rights.

THE COURT: Mr. Nathan, I am not quite sure I understand the emphasis which you placed or the predominence of theme and background music, as you called it. Would you explain that?

THE WITNESS: I would be happy to, your Honor.

One of the problems as I emphasize in this matter of how one would deal in the direct licensing has to do with what is involved in it, what are the problems, the problems of making the contact, identifying, undertaking the negotiations.

Now, in background and theme music the producer or packager has a direct relationship with the creator of that theme and background music. He is hired, he is paid for the writing. There is a contact. It isn't a problem of finding out who did it, where he is and what and the result is that as one engages in negotiating with these writers for the product which they are going to provide, there certainly is no organizational procedure complication involved in negotiating performance rights for that individual.

THE COURT: I understand that.

Q Let me ask you this:

In terms of theme and background music, is there any more to it than just the organizational set up in your view?

A May I ask, is that with respect to the direct licensing?

Q Yes, direct licensing of theme and background music.

A Well, there's more than just the organizational

side, yes, because, as I understand it. And again derived from my studies and my reading of the testimony here, by and large theme and background music is used for the given program for which it is written.

Now, there are exceptions where a theme and background music for a certain production--I recall Never On Sunday--that became quite a hit as a theme song, but this--from everything I have observed and studied, this is an exception.

The fact that your theme and background music is primarily geared to that product also renders this entirely practical.

Q Do you have any views as to the bargaining power that might exist in a situation where a producer of a program tries to negotiate with a writer for theme and background music?

A Yes, I do have a view on that.

Q Let's hear it.

A My view is that the producer and the CTN stand in a close relationship to each other. This is well-established, established again I think from all the testimony. In that respect the producer is there with a major network, with all it offers in terms of exposure, in terms of opportunities, vast number of stations played and station resources of funds.

That writer is anxious obviously to enhance his income as well as his reputation. He also would understand, I am sure, that--at least I believe he would understand as an economist that the problem of policing, the problem of monitoring, the problem of compensation would be quite simple with respect to CTN as distinguished from the local television stations and the local broadcasting stations. He would be bargaining with a very strong force who is offering I would hope a variable return for the number of performances. I think the bargaining strength is largely on the CTN and the packagers' side.

Q Mr. Nathan, what about programs which to some extent or to a large extent do not use theme and background music, let's say a variety program or programs?

What is your judgment as to the practicability of a direct licensing system as to those kinds of programs and their music needs?

A Generally or Columbia Television Network?

Q I'm talking now about Columbia Television Network.

Q I thought so. I just wanted to be sure.

There again, I think it is a practical matter. In the variety program one does not have the on-going contact with the writer, andthe fact that you are dealing with him on one piece and it should be easy to involve the per-

formance rights at the same time with the writing arrangements. But here again the magnitude of the transactions which are under consideration need to be taken into account, and again over and over and over in the testimony that's been forthcoming here there's reference to the two big variety programs on CTN, namely Sonny and Cher and Carol Burnett.

Now, there are other features in the program here and there, but we are not dealing with a massive supply side, namely, with massive use of feature music on the one-hand in terms of the tremendous contacts that would be associated with massive use and, on the other hand, we are not dealing with an tentity that is very difficult to keep tabs upon.

In other words, namely the recording of how many performances and how many stations carry it and so forth. This is a muchmore manageable problem for the Columbia Television Network than the local television stations on their local programs or the radio stations.

So that, in myjudgment, from an economic point of view, direct licensing by the Columbia Television Network of performance rights ought to be manageable and practicable.

Q Do you have an opinion as to whether the present absence of any machinery, if there be such an absence, for direct licensing of performance rights to the Columbia

Television Network is an obstacle to the Columbia Television Networks and makes direct licensing impracticable? Do you understand my question?

A Yes, I understand. I'm just thinking a moment. The absence of a mechanism today for direct licensing I think would if Columbia Television Network proceeded to move into direct licensing--that absence or lack of one I think could be overcome from many points of view.

One, for instance, there is, as we all know, the Harry Fox Agency, which is an arm of the National Music Publishers Association, does engage extensively in the arrangement for syndication rights.

It's been suggested before--this is not my suggestion only--that the Harry Fox Agency might very well be developed to serve and be compensated for that service as a vehicle for direct licensing for Columbia Televison Network.

There are other possibilities, too. Columbia Broadcasting does have its own publishing firms, April and Blackwood. April belongs to ASCAP and Blackwood belongs to BMI. They might work out some relationship with other publishers or might take on this function or arrangements can be made by the television with some of the larger publishers

They can set up their own. They can have their

own mechanism of direct licensing.

Sure, there would be some problems involved, but there are problems involved in all economic activity and in all business transactions.

But I see the absence of a present mechanism an instrument for direct licensing not as a major obstable that can't be overcome.

Q There has been some suggestion heretofore that there would be circumstances under which the consent of a writer would be needed to a direct license between let us say the publisher and the Columbia Television Network.

Do you see the obtaining of that consent as an obstacle to the success of direct licensing for the Columbia Television Network?

A Organizationally it would be a problem as any organizational problem is, contacting any sizeable number of writer copyright owners would necessitate setting up mechanisms for knowing where they are and how they can be reached.

But you have a great many instruments to help in that direction. The synchronization rights are handled through Harry Fox and the Harry Fox Agency obviously knows where the publishers are and how to get in touch with the publishers and the live, alert, wide-awake publishers in order to get the use of the music, where the writers' approval is needed, will have the addresses, names of those writers. One can always develop lists. This isn't by any means an impossible task. Of course, it involves a bit of effort, a bit of imagination, a bit of ingenuity.

This is part of the enterprise sector.

I see no real problem in getting that approval.

Q Let's talk for a moment about a guest start who might appear on a variety program on Columbia Television Network, perhaps a special, and a guest start of some magnitude who insists or is able to insist that he sing a particular song and that Columbia Television Network must get him the rights to perform that particular song.

Do you see that as any problem to the success of direct licensing for the television network?

MR. HRUSKA: Your Honor, I object to the question. I don't think that is in the area of Mr. Nathan's economic expertise. I think it is more of a show business kind of problem, the temperament, the desires of a guest star.

THE COURT: I agree with you, Mr. Hruska, that it is primarily in the field of -- those who are in the entertainment industry. I think Mr. Nathan probably would, too. I will hear what it has to say. I will give it less weight than I would if he were P.T.Barnum.

A In economic terms in the business community, perhaps it is crude to say this, but in most circumstances there is a bargain to be made at a price. If an outstanding star wants to sing a specific song, obviously the producer, packager, whoever is arranging this will try to dissuade that individual from the costly music or difficulty to

acquire music, but to the extent that the bargaining doesn't succeed, at a price that product will be available. I do believe that in economics, in the practical world in which we live, no seller of a service can long be successful without some degree of reasonableness in terms of price negotiation.

The holdup process is a self-defeating process.

THE COURT: You are talking there about the writer?

THE WITNESS: Yes, that's right. If the writer -- if somebody came to X writer and said: Y song is something that Carol Channing insists on and won't go without it, we have worked with her, we have tried everything we can, we need this song, and if the usual price say is 500, it is conceivable to say a thousand -- I just can't believe in the context of the total cost this man is going to set a fee which is so exorbitantly high that it destroys the economic elements in that product and still expect that he is going to stay in business because I don't think the economy works that way.

Q Let's talk for a moment about programs in the can and commercials in the can and particularly about the music that may be recorded or taped on those programs or on those commercials.

Do you think that the fact that the Columbia Television Network had not previously obtained the performance rights to that music would be an obstacle to a direct licensing system if it were undertaken by the television network?

A I do not believe it would.

THE COURT: This is music in the can you are talking about?

MR. BLUMSTEIN: Yes, your Honor.

A I think exactly the same application applies that I just mentioned a moment ago. If that is going to be done on a direct licensing basis, Columbia Television Network is big enough and strong enough to take care of itself in the bargaining process, and I just find it hard to accept the thought that any writer who is a serious writer -- I don't mean of serious music, but serious in a career sense -- is going to jeopardize his career by taking an entity as strong and I would say respected as the Columbia Television Network is and say, I know I got you, I am going to force you to pay and pay through the nose. I don't believe that is going to happen.

Anybody who does that isn't going to get away with it, and are not going to be able to follow suit.

This is again a self-defeating suicidal process.

I just don't believe it is going to be prevalent in any significant degree.

Q So you thinkthat some sort of a reasonable accommodations will be worked out?

A I think something reasonable. I am not saying he won't have some premium. After all, in economic bargaining it is normal that one is going to exercise that strength in that bargaining which he has within reason that permits him to continue and continuity of economic relationships is very important.

THE COURT: Presumably to the extent there is a premium that would represent the value of his song in given circumstances, I take it?

THE WITNESS: That is right. Those circumstances make the value more than it otherwise would be. That is correct, sir.

Q Let's come to the subject of disinclination, if we may, Mr. Nathan.

I take it from your reading, you have heard that word used before in this record.

A Very often, sir.

Q Do you have a view as to whether the members of ASCAP would be inclined or disinclined to deal with the Columbia Television Network if the network were to cancel its ASCAP license and attempt to deal directly with the members?

A As an economist, I would say without hesitation, in my judgment that if Columbia Television Network announced firmly, expressed itself that it is canceling its blanket license with ASCAP as of a given date, and that it hereafter will negotiate through direct licensing for the performance rights which it seeks, and that that would also be true of its program packagers, those who provide them with the shows that they use, that they will be able to get the music.

Now, having said that, I don't want to say it is my judgment that the next day their doors are going to be broken down in the mad rush. It may take a little while. There will be some more hesitant than others but hesitance, timing of responsibilities, is something that happens in economic life.

Every manager of an enterprise, every owner, every entrepreneur has his own different characteristics, his own values, his own judgments and his own responses and of course there are going to be some that are hesitant and it has been expressed -- those who had long, good, wholesome, fruitful experience with ASCAP are not going to be very happy about jumping overboard and running to CTN, but if it is clear on the part of the Columbia Television Network that this is what it is doing and that it now has funds and now wants to buy performance rights on the basis of direct licensing, it will succeed in my judgment.

Q In the course of the readings that you have done, have you discerned a preference on the part of ASCAP writers and publishers to continue thelicensing of their performance rights through ASCAP?

A Without question, yes.

Q And do you believe that that preference, in your judgment as an economist, would translate itself into a refusal to deal with CBS in the event that CBS canceled its ASCAP license and would go to a direct licensing system?

A No, I do not believe so. We have preferences. All of us have our preferences, whether they are biases, prejudices or psychological responses or motivations or whatever it is but, basically, and I don't mean to say

this derogatorily but, basically, in our economic system, the response in economic activities is to the maximum reward, the response to the maximum incentive, and while the writer members of ASCAP may be ardently supportive of and enthusiastic about how ASCAP serves them and how it performs, when the chips are down it is going to be economic determination which will guide them.

And again I come back to the assumptions before that if Columbia Television network were to state unequivocally that it was terminating as of a given time its blanket license with ASCAP and was going to go to direct licensing, a lot of people would make available under direct licensing their performance product, their music, to CTN.

Now, this, as I say, this is going to vary with individuals, but the fact that some will go immediately will induce others to go and I just cannot believe that given that economic circumstance and the nature and character of the economic response in our society that you would have such a universal disinclination as to preclude the effectiveness.

There would be enough who would want this opportunity, who respect the exposure that CTN gives to music and who would say, "They are going to stop ASCAP anyhow, I am going to get that income, I am going to get

that exposure, I am going to get that potential of success," and enough in my judgment will do it so that others will then follow and I think that they can and will succeed.

Q Do you think that a publisher who made the determination to license the Columbia Television Network directly would encounter any resentment or difficulty with his writers? Would they be opposed to his direct licensing? Would they try to put pressure on him not to license directly?

A Well, again, speaking as an economist, the publisher serves in an economic role as one who aids the writer, the composer, in getting his music used, in getting it publicized, in getting it exploited, in getting fair terms and the like and I would assume in all economic circumstances this tends to be the case, that the writer would seek out that publisher in whom he would have the greatest confidence, who he would serve best or he can shift to another publisher and that he would tend to have that confidence in the publisher and the publisher would certainly benefit from having his music used by Columbia Television Network since it isn't going to go through ASCAP any more and that is the decision of Columbia and I think the publisher would then seek to get the full cooperation of the writer.

There is a common interest between these two in optimizing their income and the exposure and the use of the music.

Q I think there has been testimony here perhaps by Dr. Fisher that writers and publishers prefer ASCAP or have a loyalty to ASCAP and it would be adverse -- and would be adverse to changing the present system, because under the ASCAP licensing system they are immunized from price competition.

Do you recall that testimony?

A Yes.

Q Do you agree with it or disagree with it?

A Well, I said before I disagree with it. I think it was in relation to the same question where I said I think it is not the membership of ASCAP that immunizes the writers and the publishers from price competition. I think it is the whole system.

I think there are exceptions in the whole music performance rights, music creations, relationships, that can be exceptions, but certainly again, I come back to, with respect to other than the three major networks as direct purchasers, I cannot conceive of any, I find it hard to conceive of any system where price determination per song or per composition could possibly function.

THE COURT: It seems to me there is a somewhat different layer of, I don't know if meaning is the word or not, but between the question of what is the cause of a lack of price competition if there is one or whether there is one on the one hand and what the writers' attitude is towards his situation in the existing state of affairs.

Don't you think it is reasonable to assume that the writer does believe that it is an advantage to be a member of ASCAP because he doesn't have to compete for the price?

THE WITNESS: I suspect, your Honor, that is true but it is hard for me to --

THE COURT: Then the next question of course is would the loyalty or the attractiveness caused by that factor be sufficient to make him refuse to deal with CTN and I guess we are right back to some of the answers already given.

THE WITNESS: Yes, exception, your Honor, that I think one can't really isolate one feature of this relationship, that he might say, well, yes, I would like ASCAP because I don't have to go out on the street corner and hold up my sign and say here is my song and who will give me twenty cents or forty or auction it off. He has the other elements. He doesn't need to bother. He is a

creator writer, he doesn't need to bother about negotiating. He certainly doesn't need to bother about the policing, the monitoring, he doesn't need to bother about how he gets that check and checks that check because it comes through a system in which he has confidence, so that it is not a question, I honestly believe of loyalty to ASCAP because it precludes the price competition of his theme. I think it is a whole combination of forces.

Q Mr. Nathan, let's talk about the 3M incident for a moment. You have read something about that, I take it.

A Yes, I have.

Q It is in this record. As a result of what you know about the 3M incident, would you be prepared to change any of the judgments you have given us today about the possibility or the probability of a Columbia Television Network bypass?

A No, I would not, direct licensing, bypass, no, I would not change my conclusions.

Q Well, does what you know about the 3M situation, has it had any impact on your views?

A As I have read and analyzed and tried to understand the 3M situation, if anything I think it confirms my views.

Here you have a new entity where the risk element is very considerable.

True, the people didn't flock to its doors when it made an announcement of its interest in getting 700 compositions or thereafter some multiple thereof and I couldn't help but read where one person was vehement in manifesting a disinterest, to say the least, in dealing with 3M but, on the other hand, 3M did succeed and it did get its 700 compositions.

It may have been a little longer than it may have liked, but was successful.

Now, that, in relation to Columbia Television Network as an entity confirms my belief that Columbia would be successful.

Here is 3M, a manufacturer, Minnesota Mining and Manufacturing, puts out scotch tape where it really made its great hit and has all kinds of products, suddenly coming into this field with its equipment for piping in music to locations, commercially, succeeding.

3M, as of the time this was undertaken was a midget compared to this highly organized, efficient, resourceful organization called Columbia Television Network and if 3M succeeded, even with some difficulties, but succeeded in that undertaking, to me this sort of makes

me convinced and have confidence, if I were in Columbia Television, that I could succeed with nothing like any problems that they encountered.

You are dealing with two entities, the parallel of which tremendously favors Columbia Television Network.

Q You know of course that there were some ASCAP publishers who did not enter into agreements with 3M although approached by 3M?

A Yes, I do.

Q What do you make of that fact, in terms of your overall judgment as to the 3M situation and how it would affect direct licensing by the Columbia television Network?

A I don't know what went on in these people's mind and I am not going to pretend to, but as an economist, as I observed the proposal, namely, 3 cents per composition per tape or cassette, I must say that my first reaction was, this doesn't sound like a very good deal.

I happen to, maybe, have a wrong perspective on it but I had been through testimony and I am still working with the music publishers--we had a meeting recently with the Senator's staffs about some of the economic aspects of that two, two and a half or higher ceiling--and when I looked at that proposal and recognized that it wasn't in many ways really a performance payment; it was a payment per cassette which would go into an establishment but that establishment might use it ten times or a thousand times, this cassette; you know, one can't know in this three year contract period.

And I could perfectly understand why people would

say, "Well, I am not interested in it because it is not a very good deal."

If they came and said, "Yes, but you are not going to get my money if you don't go in it at all."

But anybody in business has to consider a price in relation to ongoing transactions, to the fundamental value of his product in relation to other transactions and I must say that the deal didn't look very good to me from what I know about it and I suspect others may have thought so, too.

Q There were some publishers who did enter into agreements?

A Yes. I read Mr. Chiantia's testimony. He entered into it and on the whole did quite well.

Q What about the reaction of AGAC and of some of the members of AGAC to 3M's direct licensing program? I take it you have read about that, too?

A Yes, I read about that and I read Mr. Burkens letter to the publisher.

Q Mr. Lane's letter?

A I beg your pardon--Lane, I am sorry--Burton Lane's letter to the publishers, yes.

Q What impact did that have on your views concerning the 3M incident.

A Well, as an economist I read that with considerable interest. This was an expression of strong views by this organization indicating it felt that the publishers had no right to engage in this performance licensing without approval of their members.

They never sued and, again, I am not surprised to see this kind of expression but it didn't prevail and that to me is the important thing.

What actually happened--did it stop, did it preclude people from coming along and joining with Tripple M. It is possible some publishers may have been made more hesitant by the receipt of that letter, I don't know, but, fundamentally, this letter from AGAC did not prevail and didn't stop the project of Triple M from going ahead.

Q From your point of view as an economist, can you see that--maybe you can't see; whichever way it is--that a writer would have an interest in what his publisher was doing by way of direct licensing outside of ASCAP?

A Well, I think a writer would have a strong interest. Again, a very positive interest, a very positive interest in trying to get his music used.

You see, the economics of this operation I think are quite clear. Namely, that if CTN were to terminate its blanket license with ASCAP and this is unequivocal,

expressed so and it is only going to go to direct licensing, even if a writer felt bitter against Columbia Television for doing this and changing that system to which he had become accustomed, where he is comfortable, where he feels good, nonetheless if he wants that work shown on Columbia Television Network and if he wants to get proceeds from that he is going to overcome--his economic interests are going to overcome any personal dissent.

I tell you nobody knows how one responds timewise and what kind of relationships occur among people and how one follows the leader but the fundamental economic forces would lead him to seek to do that which would maximize the use of his music and his income, just as his publisher would seek that.

THE COURT: Mr. Nathan, can I ask you this and I am sure that you know as a result of your reading that one of the hypotheses that's been constantly posited and I guess it is a moderately real hypothesis, is that CTN would cancel its license with ASCAP but NBC and ABC wouldn't.

If that were the case, to what degree do you think writers would be likely to turn down CTN?

A Your Honor, I think that the writers and the publishers would try to consider what the probabilities were with respect to CTN's decision.

Now, some--I am sure some people would be inclined to say, "Well, I have still got NBC as a television network and we still have ABC as a television network; we still have radio and the like" and sit it out and let Columbia suffer and maybe they will come back into the fold, some people will think of that.

On the other hand, I think there will be others who will say a lot of people are going to be hesitant thinking they are going to come back and "I am going to get in there and get my share early" and this is part of the process that goes on in economic negotiations or economic determinations and I feel that if Columbia is firm and strong and it is under that it is, that there would be enough people who would, if you want to say break the ranks, I don't care about that, and go ahead and license their music performance rights with Columbia Television Network to the extent that if you do others will do it.

THE COURT: Even if the other networks were available through ASCAP?

A That's correct, sir, even if they were available.

Q Up until this time, Mr. Nathan, I would think it is fair to say you have been bullish on the prospects for the success of direct licensing.

THE COURT: I think he is going to be retained

by CBS.

Q Are there any risks to the Columbia Television Network in a direct licensing system that you see from the economic point of view?

A Certainly there are risks, there are risks in time and price. I don't have to agree with Dr. Fisher that these risks are going to be so costly as to be prohibitive.

I think Dr. Fisher outlined one of the approaches through the option procedure, where large payments would have to be made. They might follow the option procedure but I don't think that it is of that magnitude.

But, look, every business decision entails risk and, especially when one moves to change a long-established procedure, there are questions as to how smooth the transition is going to be, how long it is going to take and what is going to happen in the interim, and their relationships with their producers and their guest stars and the like and it seems to me obvious there are going to be risks, but that is the name of the game and if somebody doesn't want to engage in risks, and wants to be protected against any risk, then I think one doesn't really believe in the competitive system and they won't have a risk and they won't have a reward.

Q Are the risks of such a magnitude that no prudent

businessman would possibly undertake it?

A I canhot envisage this. I tried to see, through various alternatives, risks of that magnitude.

MR. TOPKIS: Before we adjourn, could I inquir e of CBS through your Honor whether it has been able to find out whether we may have access to the information relating to programs and the information that we discussed yesterday.

THE COURT: Let's go in the robing room and find out.

(Recess.)

(Adjourned to Wednesday, December 5, 1973, at 10:00 A.M.)

December 4, 1973

3749	16	yeur	your
3749	17	recollectionregarding	recollection regarding
3750	15	altogether	all together
3751	4	t in the	in
3754	16	all the	all, the

3919- 2

PAGE	LINE	ERROR	CHANGE TO
3755	7	study, situation	study of the situation
3758	23	recallthat	recall that
3760	7	250	250th
3762	5	lisence	license
3764	7	the need	a necessity
3764	8	to	for
3764	8	station and	station. And
3764	11-13	"The ... collectively.	(Continue as part of previous ¶.)
3764	13	Quite	"Quite (Begin new ¶.)
3764	14	"In	In
3764	16	repertoire	repertory
3764	20	works the	works, for the
3764	21	worth in	worth, in
3764	21	opinion and	opinion. "And
3765	2	Ryan	Ryan,
3765	2	insistance	insistence
3766	9	instruction	construction
3767	18	Financial	Finance
3767	21	Financial	Finance
3770	7	networks	network's
3770	24	12	14
3771	5	present recorded	pre-recorded

3919- 3

PAGE	LINE	ERROR	CHANGE TO
3771	14	than I	than, I
3771	14	excluding obtaining	excluding, obtaining
3771	21	and having	and, having
3771	22	decision all	decision, all
3772	7	12	14
3772	11	producers its	producers of its
3772	13	pre-recorded broadcasts."	prerecorded broadcasts?"
3773	9	desires.	desires?
3774	9	tin	tion
3775	9	this	they
3775	10	paid	pay
3775	12	do after,	do, after
3775	13	price.	price."
3775	25	repertoire	repertory
3775	25	would in	would, in
3775	25	run be	run, be
3776	4	doesn't nor	doesn't, nor
3776	4	CBS apparently.	CBS, apparently
3776	5	1940-'41	1940-41.
3776	10	so and	so. And
3776	12	injured, in	injured, yes, in
3776	12	run, but	run. But
3776	13	dollars, but	dollars. But

PAGE	LINE	ERROR	CHANGE TO
3776	21	adequate	adequately
3776	24	believe	belief
3777	6	we ill	we will
3778	15	BNC	NBC
3779	25	adlibing	adlibbing
3780	7	include	conclude
3780	25	Eeven	Even
3782	17	he	we
3783	6	effected	affected
3785	6	that will	that we will
3786	7	youhad	you had
3788	14	ones	once
3789	7	ones	once
3790	14	thinkthat	think that
3793	4	interposit,	interpose it,
3793	9	dn't	don't
3793	16	COURT:	WITNESS:
3793	18	whenyou	when you
3794	5	wich	which
3795	2	toread	to read
3795	9	it	it,
3795	18	hat	that
3795	20	operatingunder	operating under

PAGE	LINE	ERROR	CHANGE TO
3796	25	EXuse	Excuse
3800	25	- say	- "say
3801	2	items. Does	films - does
3801	4	commodity.	commodity?"
3801	5	was, if	was, "If
3801	5	and	in
3801	6	theatres,ASCAP	theatres ASCAP
3801	7	television--	television"--
3801	8	said, in	said, "In
3801	8	primarily.	primarily?"
3801	8	responded, yes	responded, "Yes
3801	10	used.	used."
3801	11	asked, and	asked, "And
3801	11	it	these
3801	11	the	these
3801	12	films.	films?"
3801	12	answered, when	answered, "When
3801	12	used on	used, when used on
3801	13	sir.	sir."
3801	14	said, I	said, "I
3801	14	questions, and	questions." And
3801	15	said, that	said, "That
3801	15	marketing, by	marketing by

PAGE	LINE	ERROR	CHANGE TO
3801	15	way, if they -	way. If they" -
3801	16	- had	" had
3801	17	movies and	movies, and
3801	18	contracts	contract
3801	19	known there	known, there
3801	21	today I	today, I
3801	22	course.	course."
3802	2	quote"almost	quote "almost
3802	9	are	were
3805	11	court	Court
3809	10	publish. If	publish, if
3809	14	organization.	organization,
3809	15	As I	No ¶ as I
3809	15	BMI,	BMI.
3809	16	all	All
3811	11	court	Court
3811	21	diminised	diminished
3812	4	bout	about
3819	24	about the	about the small time
3821	15	credited	credits
3822	5	choses	chooses
3822	24	national	natural
3823	3	802	820

PAGE	LINE	ERROR	CHANGE TO
3824	10	did	didn't
3824	20	ASCAp	ASCAP
3824	25	persuade?	persuade.
3825a	3	Fischer	Fisher
3828	14	found	four
3829	16	jsut	just
3830	2	Q	(delete)
3831	7	andABC	and ABC
3834	12	"Q	Q
3834	14	"A	A
3837	12	VEry	Very
3838	8	experience	importance
3839	9	tothe	to the
3839	18	comply	compliance
3839	22	inthe	in the
3841	5	hear	here
3842	15	availability	eligibility
3843	6	at University	at the University of Pennsylvania
3843	12	bachelor	Bachelor
3843	13	sciences	Sciences
3843	14	Department, University	Department of the University of Pennsylvania

PAGE	LINE	ERROR	CHANGE TO
3843	16	into	to
3843	19	a	an
3843	20	Degree	degree
3844	22	Degree	degree
3845	3, 6	Kusnitz	Kuznets
3845	7	complted	completed
3845	13	ondunemploy-	on unemploy-
3847	5	and joined	and which have joined
3847	5	U.N.	U.N.,
3847	17	tend	attempt
3847	18	prospection	prospects
3847	19	moove	move
3847	20	acelerating	accelerating
3848	4	multi-modal,	multi-modal
3848	11	effect	affect
3849	21	but	and
3849	24	Director	director
3852	13	Committe	Committee
3853	7	land mobile	land-mobile
3853	24	Trust	trust
3856	3	committee	Committee
3857	21	t athat	at that
3857	23	then ,	then,

3919- 9

PAGE	LINE	ERROR	CHANGE TO
3858	2	1964	1974
3858	11	DeanAssociates	Dean Associates
3858	21	andwhom	and whom
3861	9	At	On
3861	10	mprimarily	primarily
3861	12	TVHF	the VHF
3861	23	BMI with	BMI - with
3863	9	themembers.	the members.
3863	11	themusic,	the music,
3864	16	consensus	census
3865	25	homegeneous	homogeneous
3867	2	orcould	or could
3867	25	rhough	through
3870	5	providing	providing -
3870	6	for consent	or the consent
3870	6	arrangement, providing	arrangement - providing
3870	16	yougive	you give
3871	17	the past	the past
3871	18	uses	use is
3872	1	38372	3872
3872	4	theuses	the uses
3872	6	was wanting	wanted
3872	6	an	a
3872	7	hour	lower

3919- 10

PAGE	LINE	ERROR	CHANGE TO
3872	23	his	he has
3872	24	in	and
3873	21	right	rights
3874	3	anyone	any one
3876	14	wherher	whether
3876	15	econic	economic
3876	16	transaction	transactions
3877	2	youread	you read
3877	15	matket	market
3877	22	to a	to
3878	18	forward	forth
3878	22	assures	assure
3879	7	of	or
3879	17	butbeyond	but beyond
3879	24	I t	It
3881	6	inpricing	in pricing
3881	6	stops especially	stops, especially
3881	8	returned	of return
3882	8	Princes	Princess
3882	8	Touch tone	Touch-tone
3883	7	freedome	freedom
3884	7	theunion	the union
3884	24	purchaser	publisher

3919- 11

PAGE	LINE	ERROR	CHANGE TO
3886	7	I	is
3886	7	of the	and the
3886	25	think this	think, this
3887	16	product	products
3887	16	use .	uses
3888	3	cartell	cartel
3888	9	cartell.	cartel.
3888	19	entity	entry
3888	20	Fischer	Fisher
3890	25	copyrightedmusic	copyrighted music
3891	3	copyright	copyrighted
3891	8	played,	played by
3891	11	the	it the
3891	13	quite contrary	quite to the contrary
3891	15	owners	owners of
3891	21	use	user
3892	17	already the context and the writing	obtaining contracts for the writing
3893	2	as I	I
3893	14	procedure	procedural
3895	21	Q	A
3895	24	andthe	and the
3896	13	tentity	entity

3919- 12

PAGE	LINE	ERROR	CHANGE TO
3896	17	muchmore	much more
3896	20	myjudgment	my judgment
3897	3	Networks	Network
3897	13	syndication	synchronization
3897	24	television with	television network with
3898	7	an	and
3900	2	start	star
3900	4	start	star
3900	25	difficulty	difficult
3902	24	are	is
3903	4	thinkthat	think that
3904	24	responsabilities	responses
3905	4	ownv alues	own values
3905	15	thelicensing	the licensing
3906	20	tie	its
3906	22	his	this
3907	18	who he would	who would
3907	18	serve best	serve him best
3908	16	of	in
3909	19	exception,	except
3910	2	creator	creative
3910	7	believe of	believe, of
3910	10	+	Q

PAGE	LINE	ERROR	CHANGE TO
3913	17	Senator's	Senators'
3914	19	Burkens	Burton's
3914	20	publisher	publishers
3915	11	Tripple	Triple
3915	25	is	were
3917	12	econ omic	economic
3917	14	under	understood
3917	16	and go	and would go
3917	18	do	don't
3918	22	thenI	then I
3919	3	canhot	cannot
3919	5	inquir e	inquire

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

3919- 14

COLUMBIA BROADCASTING SYSTEM vs. AMERICAN SOCIETY OF COMPOSERS, AUTHORS and PUBLISHERS	Before: HON. MORRIS E. LASKER, District Judge 69 Civil 5740

New York, December 5, 1973

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